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REPORTS OF CASES
HEARD AND DECIDED IN THE
H O U S E O F L O R D S

ON
APPEALS AND WRITS OF ERROR,
AND CLAIMS OF PEERAGE,

DURING THE SESSION

1844.

By C. CLARK AND W. FINNELLY, ESQRS.,

BARRISTERS AT LAW.

EDITED,

• WITH NOTES AND REFERENCES TO AMERICAN LAW,
AND SUBSEQUENT ENGLISH DECISIONS,

BY

J. C. PERKINS.

VOL. XI.

BOSTON:
LITTLE, BROWN, AND COMPANY.

1874.

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TABLE OF CASES REPORTED

IN THIS VOLUME.

[The numerals refer to the marginal pages.]

	Page
Bourne v. Gatliff (<i>Carrier — Responsibility for Loss by Fire — Evidence — Pleading — Practice — Costs</i>) . . .	45
Brown v. Boorman (<i>Broker — Action on the Case — Pleading</i>)	1
Byron v. Cooper (<i>Tithes — Statute — Pleading — Modus — Practice</i>)	556
Charter v. Trevelyan (<i>Fraud — Solicitor and Client — Practice; Bill of Review</i>)	714
Creed v. Creed (<i>Will; Real Estate — Annuities — Legacies — Priority</i>)	491
Farrell v. Gleeson (<i>Judgment — Scire Facias — Statute of Limitations — Costs</i>)	702
Gray v. The Queen (<i>Felony not Punishable with Death — Peremptory Challenge</i>)	427
Knight v. Boughton (<i>Devise in Fee; whether Absolute or in Trust — Precatory Words — Uncertainty of Subject</i>) . .	513
O'Connell and Others v. The Queen (<i>Criminal Pleading — Indictment — Witnesses before the Grand Jury — Continuances — Challenge to the Array — Findings — General Judgment — Recognizances — Practice — Arrest of Judgment</i>)	155
Rosslyn, Earl of v. Aytoun (<i>Public Office — Appointment — 57 Geo. 3, c. 64</i>)	742
Sanford v. Morrice (<i>Deed — Shifting Clause — Will — Appointment — Intermediate Rents — Pleading; Codefendants</i>)	667

	Page
Stockton and Darlington Railway Company v. Barrett (<i>Act of Parliament — Construction of "Exportation" and "Port" — Cumulative Charges</i>)	590
Sussex Peerage (<i>Royal Marriage Act; Construction — Evidence — Foreign Law — Witness skilled by virtue of Office — Practice</i>)	85
Taylor v. Clemson (<i>Statute — Railway Company — Inquisition — Jurisdiction</i>)	610
Waterford, Marquis of v. Knight (<i>Tithes — Account — Customary Payment — Legal Title — Pleading — Statutes</i>) .	653
Waters v. Groom (<i>Trustee; Contract of Sale — Specific Performance</i>)	684

TABLE OF CASES CITED.

[The numerals refer to the marginal pages.]

A.		Page		Page
Acton v. Acton		509	Bernard v. Minshull	513
Alabama & Tennessee R. R. v. Kidd		45	Bertie v. Falkland	425
Alexander v. Montgomery		426	Birch v. Wade	531
Alton Woods, Case of		250	Birtwhistle v. Vardill	139
Angle v. Alexander	288,	400	Bishop v. Ware	78
Anon., Sid. 171		136	Blair v. Bromley	714
Styles, 233		188	Blake v. Veysie	572
Ansell v. Waterhouse		79	Bland v. Bland	531
Appeals, Cases of		483	Blennerhasset v. Day	726
Asfordby v. The two Newcomens			Blodwill v. Edwards	192
565, 573, 574,		583	Blumenthal v. Brainerd	45
Ashby v. White		425	Bonser v. Kinnear	513
Ashton v. Ashton		500	Bosanquet v. Woodford	637
Att.-Gen. v. Hall		531	Bowditch v. Soltyk	556
Auriol v. Smith		725	Bradley v. Banks	214
Austin v. Chambers		740	Brancker v. Molyneux	631
Aylward v. Kearney		727	Brewster v. Angell	533
B.			Briggs v. Penny	513
Banbury Peerage Case		100	Brittain v. Cromford Canal Co.	600
Bankes v. Baroness Le Despencer		533, 534	Bromley's Case	435, 475
Barber v. Meyerstein		45	Brook v. Brook	85
Barnard v. Tugser	708,	710	v. Jenney	632
Barrett v. The Stockton and Darlington Railway Co.		590	Brown v. Brown	501
Barrs v. Fewkes		513	v. Commonwealth	155
Bastard v. Proby		534	v. Dixon	15, 29
Basten v. Carew	637,	651	v. Higgs	531, 545
Beale v. Beale		503	v. Lowell	610
Beeston v. Booth		501	v. State	155
Bennett v. Daniel		596	Browne's Case	568, 575
Bennett's Branch Imp. Co.'s Appeal		590	Buckler v. Angell	33
Berkeley Peerage Case	107,	109	Buckles v. Lafferty	714
			Bulkley v. Wilford	728
			Bull v. Bull	513
			Bullock v. State	155
			v. Stone	679
			Burdon v. Flower	72, 79
			Burnett v. Lynch	9, 18, 25, 32
			Buttery v. Robinson	502
			Byron v. Cooper	657

C.		Page			Page
Cabell v. Vaughan		10, 23	De Bode's, Baron, Case		116
Campion v. Kille		85	De Montmorency v. Devereux		714, 740
Carr v. Errol, Lord		676, 678	Denbawd & Woodley's Case		474
Carratt v. Morley		631	Devenhill v. Fletcher		508
Carrick v. Errington		679	Devon, Duke of v. Atkins		500
Carter v. Palmer		728	Dickon v. Clifton		17, 24
Cary v. Cary		528	Di Sora v. Phillips		85
Castledine v. Mundy		192, 225	Dobson v. Racey		714
Chambers v. Waters		684	Dodge v. Essex Ins. Co.		714
Champion v. Rigby		726	Doe d. Bywater v. Brandling		226
Chapman's Case		537	Heneage v. Heneage		676, 679
Chapman v. Lincoln, Bishop of		565, 573	Lumley v. Scarborough		679
v. Monson		565, 573	Patteshall v. Turford		113
Cherry v. Legh		661	Payne v. The Bristol and Exeter Railway Co.		625, 636, 648, 651
Chetham v. Sleigh		246	Doggett v. Emerson		714
Chicago & Rock Island R. R. Co. v. Warren		45	Dorchester, Lord v. Effingham, Earl of		533, 534, 541
Chickering v. Fowler		45	Doughty v. Somerville & Eastern R. R. Co.		86
Cholmondeley v. Clinton		726	Douglas v. Hamilton		426
Christie v. Unwin		631, 637	Drake v. Att.-Gen.		185, 231
Claxton v. Langton		566, 573, 574, 583	Duberley v. Page		79
Cloncurry's, Lord, Case		98, 124	Dunglas, Lord v. Officers of State in Scotland		185, 231
Coalheaver's Case		430	E.		
Coates's Appeal		513	Eade v. Eade		532
Coats v. Chaplin		78	Eales v. England		531, 545
Coggs v. Bernard		9, 10, 13, 16, 25, 30	Eardley v. Turncock		75
Collins v. Carlisle		513	Eaton v. Watts		513
Commonwealth v. Hawkins		155	Edwards v. Baugh		33
v. Howe		155	v. Vernon, Lord		659
v. Nickerson		155	Elliott v. Holden		566, 583
Conron v. Conron		491, 507	Ellis v. Selby		532
Coppin, <i>In re</i>		115	Elsee v. Gatward		24, 32
Corbett v. Packington		8, 13, 15, 26, 29	Everard v. Patteson		67
Counden v. Clerke		537	F.		
Crespigny v. Wittenoom		599	Farran v. Beresford		704, 708, 712, 713
Croft v. Ayer		572	v. Ottiwell		703, 704
Crompton v. Bearcroft		139, 151	Fitzherbert v. Leonard		708
Crossley v. Clare		537	Flint v. Hughes		513
Cruwys v. Colman		531	Forbes v. Ball		531
Curtis v. Rippon		532	Ford v. Fowler		541
D.			v. Holden		684
Dale v. Hall		17	Fowler v. Willoughby		509
Dalrymple v. Dalrymple		115	Foxcroft v. Parris		660
Daniels v. Adams		695			
Dashwood v. Peyton		531			
Davoue v. Fanning		714			
Day v. The King		631, 648			
De Beauvoir v. Rhodes		696			

TABLE OF CASES CITED.

ix

	Page		Page
Francis v. Stewart	198	Hill v. Hill	533
Frederick v. Lookup	75	v. St. John	426
Frost's Case	185	Hogg v. Kerr	747
		Holdesworth v. Procter	192
		Holman v. Loynes	732
		Holt v. Meddowcroft	628
		Hopkins v. Hopkins	533, 678, 679
		Horwood v. West	531
		Hudson v. Nicholson	19, 27
		v. State	155
		Hughes v. Davies	661, 663, 666
		Hull Dock Co. v. Browne	599, 600,
			607, 608, 609
		Humberston v. Humberston	533,
			534
		Hunt v. Bass	714
		Huskinson v. Bridge	513
		Hutton v. Balme	369
		Hyde v. The Trent Navigation	
		Co.	56, 78
		I.	
		Iddings v. Bruen	684
		Ilderton v. Ilderton	151
		Irvine v. Sullivan	513
		Irving v. De Kay	556
		J.	
		Jennings v. Commonwealth	155
		Johnson's Case	472
		Jones v. Hill	11
		v. Morley	544
		K.	
		Kealey v. Bodkin	709
		King, The v. All Saints, South-	
		ampton	629, 637,
			648
		v. Austrey, Inhabi-	
		tants of	627
		v. Bagshaw	628, 637,
			643, 648
		v. Benfield	208, 211, 239,
			259, 269, 285, 289,
			303, 396, 397, 415
		v. Bourne	212
		v. Brady	217
		v. Burrridge	187
		v. Carlile	192
		v. Cheere	199
		v. Collier	229

G.

Ganer v. Lanesborough, Lady	124
Garland v. Carlisle	369
Garside v. Trent Navigation	
Co.	61, 63, 78
Gibbs v. Rumsey	532
Gilbert v. Chapin	513
Gildart v. Gladstone	68, 600, 607
Giles v. Horrex	571
Gillibrand v. Scotson	572
Glamorganshire Canal Co. v.	
Blakemore	238
Gleadow v. Atkins	105, 106
Godefroy v. Joy	11, 13
Gould v. Gould	714
Govett v. Radnidge	10, 13, 17, 21
Grant v. Astle	207, 210, 239, 259,
	269, 276, 285, 302, 309, 340, 398
Graves v. Hartford & N. Y.	
Steamboat Co.	45
Greenlaw v. King	696
Gregory v. Gregory	724, 726
Guenther v. People	155

H.

Hales v. Petit	435
Hall v. Marshall	32, 39
Hamilton v. Nickerson	45
v. Wright	728
Hancock v. Caffyn	13
Harding v. Glyn	531
Harland v. Trigg	527, 531, 542,
	546
Harman v. Clarke	56, 58
Harper v. Phelps	513
Harris v. Mullett	644
Harrisons v. Harrison	513
Hawley v. Cramer	714
Hayter v. Moat	34, 35, 40, 43
Hazen v. Commonwealth	155
Head v. Providence Insurance	
Co.	590
Hendricks v. Robinson	684
Henry v. Hancock	542
Higginson v. Barneby	533
Higham v. Ridgway	104, 106, 111,
	112
Hill's Case	417

TABLE OF CASES CITED.

King, The v. Cooper	Page 197
v. Croke	625, 637, 650
v. Dickenson	192
v. Downshire, Mar-	
quis of	631
v. Eccles	228
v. Edmonds	187, 224
v. Edwards and Oth-	
ers	233
v. Ellis	212
v. Fuller	209, 216, 217, 243, 303, 399
v. Geach	439, 470
v. Gill	197, 228
v. Goddard	436
v. Gordon, Lord Geo.	195
v. Hall	400
v. Hart & White	214
v. Hempstead	287, 296
v. Hill	262, 305, 319, 381
v. Holland	217
v. Hollingberry	258, 400
v. Hulcott, Inhabi-	
tants of	629, 648
v. Hungerford	201
v. Ingram	208, 209, 398
v. Johnson	438
v. Kenworthy	212
v. Liverpool, Mayor	
of	628, 637, 641, 647
v. Macartney	437, 450, 474
v. Manning	631, 637, 641, 647
v. Mason	278, 283, 290, 291, 292, 304, 319, 340, 341, 382, 399, 417
v. Mawbey	227
v. Middlesex, Jus-	
tices of	226
v. Norwich Road,	
Trustees of the	648
v. Okey	472
v. Pease	596
v. Perrott	194
v. Powell	216, 257, 264, 276, 283, 290, 296, 304, 315, 342, 378, 383, 417
v. Purchas	436
v. Rhodes	316, 397
v. Richards	192
v. Richardson	197
v. St. George	436
v. Solomons	217
King, The v. Sterling	Page 228
v. Swansea Harbour,	
Trustees of	627, 636, 642, 649
v. Taylor	443, 477
v. Tiffen	188
v. Tucker	214
v. Uryln	219
v. Walcot	212, 214
v. Watson	227
v. Wilkes	229, 435
v. Winchester	190
v. Woolff	209, 225
v. Young	269, 278, 283, 290, 291, 296, 304
Kinlyside v. Thornton	10
Kirby v. Potter	500
Kirkwood v. Thompson	684
Kite v. Lane	648
Kline v. Baker	85
Knight v. Marjoribanks	684
L.	
Lacon v. Higgins	124
Lake v. Skinner	572
Lakins v. Lamb	221
Latham v. Rutley	79
Lautour v. Teesdale	99
Lawless v. Shaw	541
Lea v. Welch	8, 33
Leechmere v. Lavie	532, 542
Lefroy v. Flood	513
Leonard v. Earl of Sussex	534
Levinger v. The Queen	481
Lewin v. Edwards	260
v. Lewin	502, 508
Lewson v. Kirk	23
Life Association of Scotland v.	
Siddal	740
Lincoln, Countess of v. New-	
castle, Duke of	533
Lindo v. Belisario	99
Lindow v. Fleetwood	533
Lines v. Darden	513
Liverpool Canal Company v.	
Hustler	600
London, Bishop of v. Ffytche	426
Long v. Short	500, 508
M.	
McAndrew v. Whitlock	45
McClure v. Ashby	714
M'Cormick v. Garnett	85

TABLE OF CASES CITED.

xi

McKonkey's Appeal	Page 518
Male v. Roberts	139
Malim v. Keighley	527, 542, 543, 545, 546, 548, 551
Mallack v. Brown	570
Malton v. Cove	599
Mann v. Copland	500, 509
Markham v. Smyth	572
Marsh, <i>Ex parte</i>	684
Marshalsea, Case of	637
Martin v. Hooper	500
Marzetti v. Williams	10, 12, 13, 17, 30, 31
Maskell v. Farrington	491
Mason v. Armitage	599
v. Boom Co.	590
v. Limbury	531
Massey v. Shearman	531, 545
Mast v. Goodson	17, 30
Masters v. Masters	500, 502
Medlicott v. O'Donnell	728
Medway v. Needham	85
Meggison v. Moore	518, 539
Meredith v. Heneage	513, 538, 546
Miller v. Huddleston	491
Montesquieu v. Sandys	728
Morice v. Durham, Bishop of	531, 539
Mortimer v. West	533, 541
Mortlock v. Buller	695
Moses v. Boston and Maine R. R.	45
Mountford v. Horton	8, 27
v. Nelson	38
Murdock's Case	684

N.

Negroes v. Palmer	513
Niblett v. Polton	600
Nichols v. Sheffield	679
Nolan v. The Queen	188
Norbury v. Meade	660
Norton v. Simmes	749
Norway Plains Co. v. Boston and Maine R. R.	45
Nowlan v. Nilligan	531
Nurse v. Wills	27, 39

O.

O'Brien v. Ram	708
Ommaney v. Butcher	533, 545

Ord v. Noel	Page 695, 698
Orton v. Butler	7, 16, 26

P.

Padwick v. Wittcomb	85
Page v. Leapingwell	510
Paine v. Puttenham	708
Papillon v. Voice	533
Parish v. Gilmanton	610
Parker v. Commonwealth	155
Parkinson v. Hanbury	684
Parnaby v. The Lancashire Canal Co.	18
Parsons v. Baker	545
Paul v. Squibb	714
Payne, <i>Ex parte</i>	532, 542
Peake v. Oldham	207, 210, 239, 259, 269, 276, 285, 303, 310, 340, 398
Pendock v. Mackinder	435
Pennock's Appeal	513
People v. Curling	155
v. Gilkinson	155
Perrine v. Chesapeake and Del- aware Canal Co.	590
Phalen v. Clark	714
Phillips v. Eastwood	545
Pidsley v. Carew	567
Pierrepoint v. Edwards	509
Pierson v. Garnet	527, 530, 543
Plowden v. Thorpe	564, 571, 572
Powell v. Layton	13
Pozzi v. Shipton	10, 13, 21, 79
Prevost v. Clarke	529
Pushman v. Filliter	531

Q.

Queen, The v. Ashburton, Lord	377
v. Best	233
v. Bolton	631
v. Committee-men of South Hol- land	628, 636, 649, 651
v. Conrahy	188, 224
v. Dent	124, 134
v. Fitzpatrick	224
v. Ingram	269, 303, 317, 380
v. Manchester and Leeds Railway Co.	627, 650
v. Martin	632

TABLE OF CASES CITED.

xiii

	Page		Page
Webb v. Rorke	684	Wood v. Sutcliffe	212
v. Woods	513	v. Wray	572
Webb and others, <i>In re</i>	62	Woodruff v. Cook	714
West v. State	155	Woolmore v. Burrows	533, 534, 541
Wheate v. Hall	533	Wright v. Atkins	528, 534, 537, 540, 546
Wilcox v. Rhodes	510	Wright, Executors of v. Nutt	706
v. Wilcox	509	Wynne v. Hawkins	527, 531
Wilkes's Case	454		
Wilkes v. The King	251, 276		
Williams v. Brown	502		
Wills v. Wills	679		
Wilson v. Knubley	193		
v. Major	532		
v. Mason	568, 574, 575		
Winsor v. The Queen	489		
Wise v. Wise	35		
Wood v. Cox	513, 529		
v. Crocker	45		

Y.

Yates v. Pym	60
v. Thompson	85
Young v. The King	245, 264, 269, 278, 283, 290, 291, 296, 318, 340, 341, 342, 382, 383, 398, 417

THE subjoined Tables are compiled from Returns — made by order of the House, in March, 1844 —

Of the Number of Days in each Year in which Causes were heard for the last Twenty Years ;

Of the Number of Appeals and Writs of Error to the House during that period ; distinguishing those entered each Session, and stating the Number heard each Session, the Number remaining unheard each Session, and the Number of those that were heard in each Session, but stood over for judgment to a subsequent Session :—

YEARS.	Days upon which causes were heard.	Number of causes entered in each session.	Number heard.	Withdrawn or otherwise disposed of.	Remaining unheard.	Number heard, and which stood over for judgment.
1824	79	66	94	85†	142	7
1825	84	44	92	17	77	7
1826	51	*	—	—	—	8
1826-1827	58	70	58	8	74	6
1828	63	51	40	7	78	1
1829	34	*	—	—	—	6
1830	60	*	—	—	—	10
1830-1831	51	*	—	—	—	1
1831	43	35	49	1	56	4
1831-1832	45	51	27	4	77	8
1833	48	*	—	—	—	8
1834	58	51	56	9	75	8
1835	80	32	64	5	88	5
1836	55	36	13	1	60	4
1837	60	35	42	2	51	11
1837-1838	66	61	35	8	74	19
1839	58	46	35	6	79	7
1840	74	37	40	5	71	16
1841	34	36	22	4	81	9
1841 (Sess. 2)	Nil.	11	Nil.	Nil.	92	Nil.
1842	74	41	48	8	77	10
1843	56	44	28	7	86‡	6

* The cause lists for these years were lost by the fire in 1834.

† Most of these being writs of error for delay, were *non-prossed*.

‡ Of these, about twenty-two were non-effective causes, not likely to be further proceeded with. The number of causes has increased since 1843, and now (1845) exceeds one hundred.

CASES
IN THE
HOUSE OF LORDS.

C A S E S
IN THE
H O U S E O F L O R D S
ON APPEALS AND WRITS OF ERROR.

BROWN v. BOORMAN.

1844.

RICHARD THORNTON BROWN *Plaintiff in Error.*
THOMAS HUGH BOORMAN, THOMAS
BOORMAN, and THOMAS MARTYR } *Defendants in Error.*
WILD }

Broker. Pleading.

In case, the declaration alleged that A. employed B. as a broker, to sell and deliver oil, on the terms contained in such contracts of sale as should be made with persons who should become purchasers thereof, for reasonable commission to B. : that B. accepted the employment, and sold oil to C. on the terms of payment on delivery : that it thereupon became the duty of B. not to deliver the oil without payment : that B. delivered the oil to C., but did not obtain payment, whereby the plaintiff was damnified.

Held, that this declaration set forth a good cause of action : that the duty of B. arose out of the contract ; and that, after verdict, judgment could not be arrested.

Wherever there is a contract, and something is to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the party injured may recover either in tort or in contract.

May 31; June 3, 1844.

THIS action was brought by the defendants in error to recover from the plaintiff in error the damages which they alleged they had sustained by the negligent and improper conduct of the plaintiff in error.

The declaration, which was in case, contained the following allegations:—

For that whereas, before, &c., the said plaintiffs carried * 2 on the trade or business of linseed-crushers at * Bran-bridges, in the county of Kent, and the defendant during all that time carried on the trade or business of an oil-broker at London aforesaid: and whereas also, on the 1st day of January, 1836, the said plaintiffs had retained and employed the said defendant, as such broker as aforesaid, to sell at London aforesaid for and on the behalf of them the said plaintiffs, certain quantities, to wit, thirty tons, of linseed oil, and to deliver the same in the port of London aforesaid, according to the terms of the contract or contracts of sale, to such person or persons as should become the purchaser or purchasers thereof, for certain reasonable commission and reward to him the said defendant in that behalf; which said retainer and employment the said defendant then accepted: and whereas also the said defendant, as such broker as aforesaid, in pursuance of the said retainer and employment, and being duly authorized by the plaintiffs and one J. G. P. in that behalf, made a certain contract between the plaintiffs and J. G. P., whereby the plaintiffs sold to J. G. P., and J. G. P. purchased of the plaintiffs the said thirty tons of linseed oil, at the price of, &c., to be delivered in parcels, the amount of each parcel to be paid for from delivery, in ready money; which said contract the plaintiffs and J. G. P. then respectively accepted.

The declaration then alleged the consignment of part of the cargo to the defendant, and the delivery of and payment for two parcels according to the contract, and proceeded thus: And whereas also after, &c., the plaintiffs consigned to the defendant, as such broker as aforesaid, ten other tons of linseed oil, being the residue of the thirty tons comprised in the contract, to be delivered by him the defendant to J. G. P.,

upon payment of the price thereof by J. G. P. to the defendant; and the said last * mentioned ten tons of linseed * 3 oil being so consigned, afterwards, &c., arrived in London; of all which the defendant then had notice, and then took upon himself the delivery of the said last mentioned ten tons of linseed oil, according to the terms of the contract; and thereupon it became and was the duty of the said defendant, as such broker as aforesaid, to use all reasonable care and diligence that the said ten tons of linseed oil should not be delivered to J. G. P., or any other person, without the price thereof being paid to him the defendant, according to the terms of the contract; yet the defendant, not regarding his said duty, but contriving and intending to defraud and injure the said plaintiffs, did not nor would use reasonable care and diligence that the said last mentioned ten tons of linseed oil should not be delivered to J. G. P., or any other person, without the price thereof being paid to the said defendant, but wholly neglected and refused so to do, and so negligently and carelessly behaved in the premises, that by and through the mere carelessness and negligence of the defendant the said last mentioned ten tons of linseed oil were delivered to certain persons, &c., without the price for the same or any part thereof being paid by J. G. P., or any other person, to the said defendant; by reason whereof, &c., the plaintiffs have lost and been deprived of the said oil, and the price and value thereof.

The defendant pleaded, first, not guilty; secondly, that he did not undertake to deliver in manner and form, &c.; and, thirdly, that the plaintiffs had not employed, nor had the defendant accepted employment as such broker to sell and deliver in manner and form, &c. Issue was taken on all these pleas.

The cause was tried before Lord DENMAN, at the * sit- * 4 tings after Hilary term, 1839, and the jury returned a verdict for the plaintiffs below upon all the issues, with damages, 425*l*. In the following term the defendant below moved in arrest of judgment, for the badness of the declaration, insisting that the declaration showed no good cause of action; and that if it did, the form of action should have been as-

sumpsit, and not case. In Trinity term, 1841, the Court of Queen's Bench gave judgment for the defendant below, on the ground that the declaration did not state a good cause of action. (a)

The plaintiffs below thereupon brought a writ of error in the Exchequer Chamber, assigning for error that the declaration did state a good cause of action, and that judgment ought to have been given for them. On the 21st of June, 1842, the Court of Exchequer Chamber, after argument, reversed the judgment of the Court of Queen's Bench, and gave judgment for the plaintiffs below. (b)

The present writ of error was then brought by the defendant in the original action.

Mr. Butt and *Mr. J. W. Smith*, for plaintiff in error (defendant below). — The action in this case is misconceived. The remedy was by an action of contract, and not by an action on the case. The obligation here, which is alleged to have been broken, is not one which would have existed at common law, and would have been implied at law to arise from the character of the broker as such. It is the result of a special contract. The breach stated is not that which relates to the common-law character of broker, but to the special duty of not delivering without payment of price. The action is therefore misconceived.

[LORD BROUGHAM. — Originally there must have been * 5 but * a slight difference between tort and contract, as the words of the breach in assumpsit itself, "fraudulently contriving," clearly show.]

It is no doubt so ; but the difference is now well established. *Slade's Case* (c) shows that an action on the case lies on contract as well as debt. But that was case on assumpsit, the nature of the writ depending on the nature of the complaint for which the plaintiff sought a remedy. In Viner's Abridg-

(a) 3 Queen's Bench, 515.

(b) 8 Queen's Bench, 525.

(c) 4 Co 92 b.

ment and other books an action on the case is said to lie, without taking notice of the distinction between actions on the case *ex contractu* and actions *ex delicto*; yet the distinction is one which is well established in pleading. The real complaint here is misdelivery. It may be admitted that for misdelivery, or for injury to a chattel, where the party had undertaken to deliver or to take care of it, an action on the case would lie; but what sort of action on the case? The declaration here says, that the defendant took on himself the duty of delivering the goods; but the only complaint is that there was an omission to obtain the money when the goods were so delivered. There is no complaint of a misdelivery in itself. The complaint is therefore wholly independent of the contract. It was assumed in the Court below that wherever a contract exists, and a duty arises out of that contract, an action on the case will lie. But that rule is too broadly stated. If correctly stated, it would put an end to all distinctions between actions *ex contractu* and *ex delicto*. If a man receives a sum of money for another, a duty to pay it over would arise; yet no one ever heard of an action on the case for not paying it over. The same may be observed of a contract to build a house, or of an action on a bill of exchange or promissory * note, or guaranty or policy * 6 of insurance, or for not accounting. Consistently with the present judgment, no line of distinction could be drawn. The objection to this declaration is, that the duty or obligation described in it as the foundation of the action is described as resulting from the character of broker alone. If that is so, then the declaration is clearly bad. A broker is not a person to whom goods are consigned; he is not a factor.

[LORD CAMPBELL. — But though called a broker, the special contract with him is set out in the declaration; so that the name of broker appears to be immaterial.]

The allegation that he was a broker may be struck out of the declaration; but even then it is clear that the obligation, for the breach of which the action is brought, is stated as

arising on a contract, and in no other manner; and as it could not be implied on the mere employment, it can only exist on the contract, and the remedy must be on the contract.

[LORD CAMPBELL. — Is it not sufficient to show the contract, and the breach of it?]

No, there must be words of promise. There are no such words here. It never was contended below that this was a good declaration on contract.

[LORD CAMPBELL. — The declaration alleges the employment of the defendant to perform any contract that he should make with the buyers of the oil; that he made a particular contract for the sale of the oil for ready money; that he undertook to deliver the oil according to the contract he had made, which was for ready money: and then it alleges that he delivered the oil without payment of ready money. Where is the necessity for the statement of a promise?]

If there were words equivalent to a promise, the promise need not be alleged. But there are no such words here. There is no statement of an undertaking between himself and the plaintiffs. The words ought to have been, that he took on himself, to or with the plaintiffs, to deliver the oil; that would have made the assumpsit.

[LORD BROUGHAM. — That is not necessary. In a declaration in assumpsit, you say he undertook and faithfully promised to pay the plaintiff; not that he promised to the plaintiff to pay the plaintiff.]

This declaration does not state a contract between the parties to do this particular thing, the not doing of which is the subject of complaint.

[LORD BROUGHAM. — Is this an allegation of a contract with the purchaser to deliver to the purchaser?]

It is not, on the face of this declaration, an undertaking with anybody. In all the old forms, the undertaking was to the party to pay the party. The supposed contract to deliver is subsequent to the contract made with the plaintiffs below; it is altogether distinct from the employment with his principal.

[LORD CAMPBELL. — May not this be an application of his general promise to this particular parcel of oil ?]

That would not be sufficient. It is necessary to aver a distinct promise. There is none such here. The words are not that he undertook to deliver, but that he took upon himself to deliver.

This cannot be the subject of an action on the case. *Orton v. Butler.* (a) All the cases on the subject of different forms of action were there considered, and the Lord Chief Justice stated, “The law has provided certain specific forms of action for particular cases, and it is of importance that they should be preserved. We ought, therefore, to look with great jealousy to an innovation of this sort. The present count states that the defendant had and received to the use * of the plaintiff a certain sum of money, to wit 10s., to * 8 be paid to the plaintiff, but which the defendant converted to his own use. It is contended that this is a count in trover. Now the action of trover is only maintainable for specific property; it will lie for so many pieces of gold or silver, and in that case the defendant can only redeem himself by tendering to the plaintiff the same specific pieces. But in this case he clearly might do so by returning an equal sum of money. There is therefore not merely a want of certainty in the count, but it states that which is not the subject of an action of trover at all. The demurrer, therefore, must be allowed.” And Mr. Justice BAYLEY supported this view of the case, upon the ground of the necessity of adhering to the established forms of action. That case is an authority to show that the present declaration cannot be supported. *Cor-*

(a) 5 B. & Ald. 652.

bett v. Packington (a) is to the same effect. There the question was on the misjoinder of counts, and the case shows that under circumstances like these the plaintiff has not his option to declare in assumpsit or in tort, but must declare in assumpsit. *Lea v. Welch* (b) and *Mountford v. Horton* (c) are there referred to, and are directly in point here. There were no words in *Lea v. Welch* importing a promise, and the declaration was therefore held bad. There must be a promise and a consideration, to enable a party to maintain assumpsit. There is neither here.

[LORD BROUGHAM. — The consideration stated at the commencement of this declaration overrides the whole.]

This case is distinguishable from that of an attorney or a surgeon, for in them there is a duty implied by law; here the duty depends wholly on the contract, and the remedy therefore ought to be on the contract alone.

* 9 [LORD * CAMPBELL. — What is the distinction you make between an action on the case *ex contractu*, and an action on the case *ex delicto* ?]

In the first all the facts which constitute the contract must be set forth; in the other the law implies a duty, the breach of which may be alleged, as it is here. Comyns's Digest (d) shows the distinctions between the different sorts of actions. This case does not come under the division of actions on the case *ex delicto et*, yet it is brought in that form. The case of *Coggs v. Bernard* (e) was relied on below. The marginal note is this: "Case upon a promise to take up brandies, and carry them to D., and safely to lay them down, without showing any consideration;" and the declaration there was held to have stated the contract sufficiently.

(a) 6 B. & C. 268.

(b) 2 Ld. Raym. 1516; 2 Str. 793.

(c) 2 New Rep. 62.

(d) Action on the case; in assumpsit; for deceit, and for negligence.

(e) 2 Ld. Raym. 909; Comyns, 133; 1 Salk. 26.

[LORD CAMPBELL. — There was no consideration there to sustain an action of contract.]

It was cited in the Court below to show that case would lie, though there was a contract between the parties. It is no authority for such a proposition here. The obligation there was one which arose at common law. The question as to the form of action was not material there. The only question was, whether the action would lie for such a misfeasance as existed there. So that that case is not in point here. In the case of *Rogers v. Head*, (a) assumpsit was not only a proper, but the only remedy. The action on the case, as spoken of in the old books, means nothing more than an action on the special circumstances of the case; the distinction between assumpsit and tort not being properly preserved. In *Burnett v. Lynch*, (b) Lord TENTERDEN expressly says: (c) “The defendant here has not engaged by deed to perform the covenants, * and consequently covenant will *10 not lie.” He then says that he thinks assumpsit would lie, because the defendant had entered on the estate, and the law, therefore, cast on him the duty of paying the rents and performing the covenants, and implied a promise to perform that duty; but for that very reason case was maintainable for the breach of that duty. The absence of words of contract there makes that case inapplicable to the present. *Kinlyside v. Thornton* (d) likewise went on the principle of an antecedent duty, and merely decided that such a duty would not deprive the party of his remedy by action on the case. But neither of these cases applies to one where the only duty to be performed specially arises out of the contract. *Marzetti v. Williams* (e) was also cited in the Court below; but there the form of the action was never made the subject of discussion; the only question was whether the action would lie there without proof of special damage. *Govett v. Radnidge* (g) is like the case of *Coggs v. Bernard*, so far as this matter is

(a) Cro. Jac. 262.

(c) 5 B. & C. 602.

(e) 1 B. & Ad. 415.

(b) 5 B. & C. 589.

(d) 2 Sir W. Bl. 1111.

(g) 3 East, 62.

concerned. The undertaking to do the thing there undertaken raised the common-law objection, and enabled the party to maintain an action on the case. *Pozzi v. Shipton* (a) is capable of the same answer. The action was founded on the common-law obligation of carriers to deliver safely goods entrusted to them. Here the obligation does not arise from the common law, but only on the contract, and the remedy must be confined to the contract. The note to *Cabell v. Vaughan* (b) shows that where the action must originate in a contract, the action must be in the form *ex contractu*.

* 11 * *Godefroy v. Jay*, (c) which appeared to be much relied on in argument in the Court below, is not in point here; for there again the liability of the party was, in respect of his duty as an attorney, a common-law obligation arising from the employment, without any express contract. No contract could have enlarged the obligation. But suppose the action against the attorney had been for not riding to York, that must have been brought in the form of contract; for as it is not any part of the common-law obligation of an attorney to go thither, he could only have been liable in that respect by positive contract. The words of the judgment here are too large: (d) "The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, or the non-feasance, is a ground of action upon a tort." That statement is directly at variance with many decided cases. *Jones v. Hill* (e) is in point. That was an action on the case for permissive waste, which was held not maintainable against a tenant for years, where he held the premises under an express contract or covenant to repair.

[LORD CAMPBELL. — Do you think that if the money counts had been added here there might have been a demurrer for misjoinder?]

(a) 8 Ad. & El. 963.

(b) 1 Wms. Saund. 291 e.

(c) 5 Moo. & P. 284; 7 Bing. 413.

(d) 3 Q. B. 528.

(e) 1 B. M. 100.

Undoubtedly there might.

In the Court below it was wrongly assumed that there are no classes of cases in which the party might not have his election as to the form of his action. It was said, (a) "There is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach or non-performance is indifferently * either assumpsit or case * 12 upon tort, is not disputed. Such are actions against attorneys, surgeons, and other professional men, for want of competent skill or proper care in the service they undertake to render ; actions against common carriers, against ship-owners on bills of lading, against bailies of different descriptions ; and numerous other instances occur in which the action is brought in tort or contract, at the election of the plaintiff." This part of the judgment applies to all undertakings whatever, and is therefore manifestly too broad in its statement ; for, if correct, it would altogether destroy the distinction between assumpsit and tort. The proper question ought to be whether the obligation arises on the individual contract only, or on a general duty implied by law. The judgment then goes on to refer to *Marzetti v. Williams* in support of this view of the matter. But it is curious that the very first count there is on the general custom of bankers in London. So that that case cannot be said to be one of contract alone. This action ought to have been brought in assumpsit only ; it is not maintainable in the form of case ; and if treated as assumpsit, then the declaration cannot be supported, for it is defective in the statement of the promise and breach. However slight might have been originally the distinction between assumpsit and tort, it has been so long and so fully established, and has been so interwoven in the practice of the law, that the greatest inconvenience would follow from now disregarding it. If so, the only other question here is, whether this case falls within the class of cases which it is settled ought to be brought in the form of assumpsit. It is submitted that it does. This is an express contract of a particular kind ; it

(a) 3 Q. B. 525.

therefore lies on the plaintiff to point out a rule showing
 * 13 that this is a case in which * an action in the form of
 tort may be maintained. The rule is, that where there
 is a general relation and there is also a general duty, the
 plaintiff may have his election as to the form of action. But
 he cannot have that election where the supposed duty is alto-
 gether the creature of the convention and agreement of the
 parties. In such a case the cause of action is a contract and
 nothing else, and the action must be in the form of contract
 and none other. In all the cases where tort has been held to
 be maintainable, the action was brought in respect of the gen-
 eral pre-existing relation between the parties. *Marzetti v.*
Williams, (a) *Burnett v. Lynch*, (b) *Godefroy v. Jay*, (c) *Gov-*
ett v. Radnige, (d) *Powell v. Layton*, (e) *Pozzi v. Shipton*, (g)
Coggs v. Bernard, (h) *Hancock v. Caffyn* (i) (where it is said
 that the law implies it to be the duty of the landlord to pro-
 tect his tenant against distress from the superior landlord),
 are all instances of this kind. And this doctrine agrees with
 what is stated in Buller's *Nisi Prius*, (k) where it is said that
 if the law lays a duty on a man, case will lie for the breach of
 the duty, but not if the duty is not laid on him by the law.
Corbett v. Packington (l) is a decisive authority against this
 declaration ; for if the second count there was not a count in
 case, and it was held not to be so, but to be a count in
 assumpsit, it is impossible to maintain this declaration as a
 good count in case, for they are exactly like.

[LORD CAMPBELL. — Suppose the second count there had
 stood by itself, would it have been good?]

It would not as a count in case ; for Mr Justice
 * 14 LITTLEDALE * there says that the count by itself could
 not be supported as a count in tort, for that the under-

(a) 1 B. & Ad. 415.

(b) 5 B. & C. 589. ,

(c) 7 Bing. 413; 5 Moo. & P. 284.

(d) 3 East, 62.

(e) 2 New Rep. 365.

(g) 8 Ad. & El. 963.

(h) 2 Ld. Raym. 909; Comyns, 133.

(i) 8 Bing. 358.

(k) Bull. N. P. 73.

(l) 6 B. & C. 268.

taking alleged went beyond the duty, which was sought to be set up as a duty implied by law.

Then as to the question whether, supposing assumpsit to be maintainable, this is a good count in assumpsit: It is bad, because the contract is not stated as a contract between certain parties, so as to show a breach of that contract.

[LORD CAMPBELL. — Suppose that the contract had been in writing, and the writing was in the terms stated here, would not that be sufficient?]

No contract is here stated on the declaration with a sufficient breach. The first part of the declaration states a contract, but it states that of which no breach is afterwards alleged. It states an employment, but not that it was the employment not to deliver the goods without payment of the money.

[LORD CAMPBELL. — But the declaration alleges an undertaking not to deliver but on the terms of the contract, and then the contract is set out.]

It is not enough to say that the defendant took on himself the delivery of the oil. Even if that could be sufficient as an undertaking, that undertaking ought to be stated as entered into "in consideration of" something else, which is not stated here. In that important respect, therefore, the declaration is defective. It does not sufficiently state a contract, and a breach arising on the contract so stated; and in both respects, therefore, it is objectionable. The judgment of the Court of Queen's Bench was right, and that of the Exchequer Chamber must be reversed.

June 3.

Mr. Erle, for the defendants in error. — This declaration is perfectly good. The action is maintainable in the form of tort, in respect of the general duty of * a broker. * 15 A broker is a person known to the law, and bound by law to act in a particular manner in every employment which

he undertakes. The declaration here contains nothing which is not connected with the defendant's character as broker. There is no authority for saying that the duty of a broker is confined to making out the bought-and-sold notes. The statute which regulates brokers contains no restrictive provision of that kind. His employment is generally to make contracts for the purchase and sale of merchandise, and to see them completed. This general duty binds him to observe the special directions of his principal.

[LORD COTTENHAM. — If you employ a stock-broker to sell your stock, and he receives the money but does not pay it over, should you say that the neglect to do so would be a matter directly connected with his duty of broker?]

That is so. A stranger is not allowed to go on the Stock Exchange, and the law therefore imposes on the stock-broker a general duty, which binds him to perform all the special directions of his principal. The only restriction in the case of a special bailee, is that the special matter must relate to the general duty of the bailee. If a man employs a builder to build a house and gives him old materials to do so, and he does not use them but buys new materials for the purpose, and so the expense is increased, an action will lie for the breach of duty. To return to the question last raised on the other side. *Corbett v. Packington* (a) is not in point. That is a case of misjoinder only, and simply decides that two counts, one in assumpsit and another *ex delicto*, cannot be put together

in the same declaration. But in *Brown v. Dixon*, (b)
 * 16 the first count was in trover; the other * counts were in a form which the defendant assumed to be that of assumpsit, and he demurred for that reason, but the Court held the counts good. The Court said, "The rule of judging whether two counts can be joined, by considering whether the same judgment can be given on both, is perhaps not true in its extent, but by adding another requisite, it is universally true. For wherever the same plea may be pleaded, and

(a) 6 B. & C. 268.

(b) 1 T. R. 274.

the same judgment may be given on two counts, they may be found in the same declaration." Apply that test here, and the declaration will appear perfectly good. Here the same plea of not guilty goes to the whole declaration, and the same judgment can be given on the whole. But besides this, the objection now made comes too late. However much a count may be subject to special demurrer, still, after verdict, this House will, if possible, maintain the declaration, if on the whole declaration a good cause of action is set out. In Coke on Littleton, (a) it is shown that if a bailment is made with a contract to redeliver, the bailee will be liable at all events. That must mean, that if there was a special duty, an action in the form of case would be maintainable for the breach of it. Another case relied on by the other side is that of *Orton v. Butler*, (b) but the principle of that case does not apply here; for there the question simply was, whether a count charging money to have been had and received by the defendant to the use of the plaintiff, could be framed in tort, and joined to two counts in case of deceit.

In *Coggs v. Bernard*, (c) the cause of action arose out of a contract. There the count was an informal count in assumpsit, as it did not state the * consideration, and * 17 the only question was as to the sufficiency of its form.

Dale v. Hall (d) was the case of goods delivered to a hoy-man, on a contract to carry from port to port, and he was held liable to deliver them at all events. *Dickon v. Clifton* (e) was another case of a special employment where a general duty existed. In the course of that employment an injury occurred, and the count stated the special circumstances of the employment; a motion in arrest of judgment was made, and Lord Chief Justice WILMOT said, "it is objected that the first count is laid *quasi ex contractu*, and cannot be joined with trover; but I think the first count is laid *ex delicto* and as a misfeasance, which may undoubtedly be joined with trover;" and the plaintiff had judgment. *Govett*

(a) 89 a.

(b) 5 B. & Ald. 652.

(c) 2 Ld. Raym. 909; Comyns, 133; 1 Salk. 26.

(d) 1 Wils. 281.

(e) 2 Wils. 319.

v. Radnidge (a) and *Mast v. Goodson (b)* are to the same effect. *Marzetti v. Williams (c)* is the case of a bailment of money to a banker, who had a duty to perform in respect of it; and the Court there held that the breach of that duty might be treated as a tort. That case is exactly in point with the present.

[LORD CAMPBELL. — May there not be a distinction between a case where you merely show an employment and one where, in addition, you show a special contract?]

In all cases of bailment, there must be a special contract in addition to the general bailment. *Marzetti v. Williams* will always allow the customer the option of suing the banker in case for a breach of special contract. It has been pressed on the House that the first count there is on a special duty, founded on the custom of the city of London. But the other counts are on the general implied contract of a
 * 18 * banker with his customer; and the remark therefore, as to the special custom of the city of London, does not affect the argument. That case shows distinctly that the right of the plaintiff to have damages, though he proved none, was because there had been a breach of contract. His right was founded on the general law. There, too, the fault was more one of a non-feasance than of a misfeasance; it was an omission to do something; but, in truth, it is hardly possible to show any real distinction between the two.

In *Smith v. Lascelles, (d)* the action was on the case, for neglecting to make an insurance on the freight. The note is: "A merchant abroad having effects in the hands of his correspondent here may compel him to procure an insurance. If a merchant here has been accustomed to procure insurances for his correspondent abroad in the usual course of trade, the latter has a right to expect an insurance at the hands of the former, unless some previous notice be given to the contrary." Nothing can be stronger than this doctrine, for there a gen-

(a) 3 East, 62.

(b) 3 Wils. 348; 2 Sir W. Bl. 848.

(c) 1 B. & Ad. 415.

(d) 2 T. R. 187.

eral duty is made to arise out of a special mode of dealing between the parties; and the liability of the defendant existing under these circumstances was enforced there in an action on the case. That form of action was held maintainable, though the Court held that the agent here had a general duty to perform, and though there appeared to be at the same time a special contract between the parties. The doctrine of that case is decisive as to the principle applicable to the present. The averment of duty is immaterial; it is not traversable. *Parnaby v. The Lancashire Canal Company* (a) is in point. The declaration there was in case, and was *framed on an Act of Parliament; and the Court of *19 Queen's Bench thought that, as the Act gave the company an option to call on the owners of a sunken barge to clear the passage of the canal, or to do it by the company's officers and compel payment of expenses from the owner, the duty of clearing the passage was imposed by the Act, and the action was not misconceived. The Court of Error did not concur with this judgment, so far as it presumed a duty imposed by the Act, but held the duty to be a common-law duty, on the ground that if the company opened a canal and invited persons to use it when it was in a condition in which injury was sure to happen to the boats passing over the canal, the company was guilty of a breach of a common-law duty, and was therefore liable to the action. And in the judgment there it was said, "The statement of the duty in the declaration is an inference of law from the facts, and need not be stated at all; or if improperly stated, may be altogether rejected. . . . The declaration, it is true, contains no averment of such a duty; which it need not do, nor any allegation in express terms of the breach of such duty." That is the principle relied on here.

The second point is, that this count is good as a count in assumpsit; and if the House can find a good cause of action stated, it will support the declaration. In *Hudson v. Nicholson*, (b) the declaration was in form on the case: it stated that the defendant had wrongfully kept shores and timbers upon

(a) 11 Ad. & El. 228.

(b) 5 M. & W. 437.

the close of the plaintiff; a verdict was, after objection to the declaration, found for the plaintiff. An argument was
 * 20 heard, and the Court thought that the cause * of action was in fact trespass; on which it was insisted that it was the declaration that was bad, for that it was in the form of case, and had no allegation of *vi et armis*. On the other hand it was contended, that after verdict for such a cause of action, the omission of *vi et armis* would not affect the case. And of that opinion was the Court. In *Smith v. Goodwin*, (a) there were six counts in case for an irregular distress, and a seventh count for wrongfully, injuriously, and vexatiously taking goods after the distress was satisfied. It was there argued that it was the statement of the cause of action, and not the form of the commencement of the declaration, that determines what the action is. And it was said there that the seventh count showed the cause of action to be mere trespass, and that as the damages were entire the misjoinder was cause for arresting the judgment. But the Court thought otherwise; Mr. Justice PARKE thinking that the seventh count was an informal count in trover, and trover being a special action on the case, was as such maintainable. The declaration was therefore held, after verdict, to be sufficient. The principle of that case applies here. Here is the substance of a good count in contract, both as to promise and breach; and after verdict, no objection can be made to it.

Mr. Cleasby, on the same side. — Two propositions are to be supported here. First, that this cause of action sounds in tort, and that a good cause of action appears on the face of the declaration; and next, that there is a good cause of action in trespass on the case. There is an employment for a
 * 21 particular purpose. * The plaintiffs below entrust the defendant below with their goods: he takes on himself the sale and delivery of their goods, and so misconducts himself in the employment that they lose the value of their property. The ground of action sounds in deceit, and the plaintiffs may therefore maintain an action on the case. The cause of

(a) 4 B. & Ad. 413.

action here arose not on the contract only, but on the parting with the goods without payment, and the loss thereon. This is not a case in which the parties merely contracted. Here the case went further, — there was an acting on the contract: a confidence was reposed in the defendant, and he betrayed that confidence. In such circumstances as these, the party injured has his election as to the form of action. Where there appears to be deceit he may be suable in tort or on the contract, as in the case of the warranty of goods. There the action might be *assumpsit*, but it might also be tort *warrantizando vendidit*. Comyns's Digest. (a) Actions against ship-owners for not carrying goods may be brought in either way. There may be some doubt to what extent this election will apply; but that very circumstance shows how closely they are connected. Where the form of action is in tort, but applies altogether to contracts, there doubt may arise. *Govett v. Radnidge* (b) was a case of that sort. The cause of action arose upon the misconduct of the defendants in executing a contract, and the Court held that the gist of the action was tort, and therefore each defendant was treated as separately as well as jointly liable. In *Pozzi v. Shipton* (c) the point was again discussed, and the same rule was held. Bailees of goods for any purpose whatever come within this rule. In Buller's * Nisi Prius (d) it is said, "That in all cases where * 22 a damage accrues to another by the negligence, ignorance, or misbehaviour of a person in the duty of his trade or calling, an action on the case will lie; as if a farrier kill my horse by bad medicines, or refuse to shoe him, or prick him in the shoeing. But it is otherwise where the law lays no duty upon him; as if a man find garments, and by negligent keeping they be spoiled." The real question therefore is, whether the duty does exist. There can be no doubt that it does. The law is not affected by the particular nature of the trade, so as to lose its force if the party is not a broker or a banker. The law does not take notice of those distinctions of fact, but merely refers to the question whether a duty necessarily arises

(a) Action on the case; false warranty.

(b) 3 East, 62.

(c) 8 Ad. & El. 963.

(d) Page 73, 6th edit.

from the employment, and whether a trust is placed in virtue of that employment. In Comyns's Digest (a) the rule that "if a man neglect to do that which he has undertaken to do, an action on the case lies," is broadly stated. And many of the cases put by way of illustration of the doctrine are cases where no particular trade is carried on, but where a general employment exists, and a general duty arises.

In such cases there are often instances where *assumpsit* might perhaps be maintainable; but it has always been contended for the defendants here, that both forms of action would be good. So that that objection does not apply. One instance put is this: (b) "So if a man lend his horse or other profitable cattle to another *gratis*, he is bound to a strict care; and, therefore, if he neglect to take due care of it, an action on the case lies; as if he do not shut the stable, * 23 * and it is stolen." That is, strictly speaking, a tort, but it is in virtue of the contract arising from the circumstance of being entrusted with the profitable cattle. In *Cabell v. Vaughan* (c) there are some very learned notes upon this subject, the result of which seems summed up in a note of one of the recent editors, where it is said: "From all the cases the principle appears to be this, that where the action is maintainable for the tort simply, without reference to any contract made between the parties, no advantage can be taken of the omission of some defendants, or of the joinder of too many; as, for instance, in actions against carriers, which are grounded on the custom of the realm. But where the action is not maintainable without referring to a contract between the parties, and laying a previous ground for it by showing such contract there, although the plaintiff shapes his case in tort, he shall yet be liable to a plea in abatement if he omit any defendant, or to a nonsuit if he join too many." That statement shows, that although the action is founded on contract, it might be shaped in tort, if the confidence placed arose out of a general duty attaching to the party confided

(a) Action on the case for negligence, A. 4; action on the case for misfeasance, A. 3, n.

(b) Com. Dig., action on the case for negligence, A. 4.

(c) 1 Wms. Saund. 291.

in, and had been betrayed by that party. There is a case in Croke's Reports, *Lewson v. Kirke*, (a) referred to by Comyns, (b) where a master appointed his servant his agent to receive goods from beyond sea, and the declaration alleged the arrival of the goods; that certain customs were due in respect of them; that the servant took them out of the ship and landed them without payment of the customs, whereby they were lost. It was, after verdict, moved in arrest of judgment, that case lay not, by reason of the confidence or trust reposed in * the defendant as plaintiff's servant, * 24 and that the declaration was defective in not alleging that he had money to pay the customs. But the Court held the declaration good, and sustained the verdict. There the servant carried on no particular trade, yet a general duty was held to arise on his employment. The breach of duty alleged there was, that he received the goods but did not pay the money. That is exactly like the present case; where the charge is, that the defendant's duty was to deliver the goods and receive the money; and the breach, that he did deliver the goods but did not receive the money. *Dickon v. Clifton* (c) is to the same effect. *Elsee v. Gatward*, (d) where the action was in the form of case, was decided on demurrer; and it was held that a count, stating that the plaintiff, being possessed of some old materials, retained the defendant to perform the carpenter's work on certain buildings of the plaintiff, and to use those old materials, but that the defendant, instead of using those, made use of new ones, thereby increasing the expense, was good. Mr. Justice ASHURST said: (e) "If a party undertakes to perform work, and proceeds on the employment, he makes himself liable for any misfeasance in the course of that work; but if he undertakes and does not proceed on the work, no action will lie against him for the non-feasance." That case is a clear authority to show that a general duty may exist at the same time with a special contract; and that where the injury sustained is in

(a) Cro. Jac. 265.

(b) Action on the case, for deceit in his trust.

(c) 2 Wils. 319.

(d) 5 T. R. 143.

(e) 5 T. R. 150.

consequence of the breach of that duty, case will lie. The first count in that case, which was for not performing the work in proper time, was held bad; but the reason was that that count did not show that, in fact, there was

* 25 * any binding contract. In *Burnett v. Lynch*, (a) there was nothing but the contract on which the cause of action could be founded. The action was framed in case; which was held maintainable by the lessee against the assignee of a lease, for having neglected to perform the covenants of the lease during the time he continued assignee. It was contended that assumpsit, and not case, ought to have been brought. Lord TENTERDEN said, (b) that in his opinion assumpsit would lie, because the defendant had taken on himself a burden in respect of which the law would imply a promise. He added: "But it by no means follows, that because a promise may be implied by law, this action on the case, which is in terms founded on the breach of that duty from which the law implies a promise, may not also be maintainable." And Mr. Justice BAYLEY said: "I have no difficulty in saying that an action on the case founded in tort will lie, upon this ground, that from the facts stated in this declaration, the law raises a duty in the defendant to perform the covenants; that there has been a breach of that duty, and that damage has accrued to the plaintiffs in consequence of that breach of duty." These authorities show that where there is a contract there may be an action of tort founded on the neglect to perform that duty, as such neglect amounts to a deceit. The contract creates a duty, and the neglect to perform that duty is a misfeasance and a tort. It is like the case of a false warranty, where, if the parties act on it, the person making it may be sued in case. In *Coggs v. Bernard*, Lord HOLT says, (c) in speaking of a bailee to do a thing gratis: "The reason is, because in such a case a neglect

* 26 is a deceit upon the bailor. * For where he entrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent; his pretence of

(a) 5 B. & C. 589.

(b) 5 B. & C. 602.

(c) 2 Ld. Raym. 919; Comyns, 133; 1 Salk. 26.

care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground of action." That is precisely the case here. The plaintiffs below were induced to entrust the defendant with the oil, and they have been deceived. As soon as the plaintiffs below had parted with their property to defendant below, he incurred an obligation to treat those goods in a particular manner. The relation from which this action arises subsists by reason of the goods of one party coming under the control of the other.

As to *Corbett v. Packington*, (a) that was not only a case of misjoinder, but there the count was only good as a count in assumpsit, therefore it could not be joined with counts in tort. Here the count is alleged not to be a good count in assumpsit. It does not appear that a good count in case might not have been framed there. But the only matter of promise there stated was the promise to redeliver on request; and being thus put clearly and exclusively in assumpsit, the party could not afterwards treat it as case.

As to *Orton v. Butler*, (b) there are but two remarks that need be made; namely, that if that action was maintainable, a party would always be deprived of his set-off; and next, that he could not pay what was required, except in the very same coin in which he had received the money. The circumstances of that case render it wholly inapplicable to the present.

Then on the second point: If a good cause of * action * 27 is shown, that is sufficient. It is not denied that there appears a good statement of some right of action; the question has been confined to the mere form.

The two Statutes 5 Geo. 1, c. 13, and 16 & 17 Car. 2, c. 8, and the case of *Hudson v. Nicholson*, (c) show that no judgment shall be arrested for a variance between the writ and declaration, nor for mere matter of form. The remedies must depend on the transactions themselves.

(a) 6 B. & C. 268; 9 Dowl. & Ryl. 258.

(b) 1 Dowl. & R. 282; 5 B. & Aid. 652.

(c) 5 M. & W. 437.

[LORD CAMPBELL. — Did you argue it on this ground in the Exchequer Chamber?]

Not exactly ; but it has always been argued, not that assumpsit will not lie, but that a good cause of action in case is shown. That necessarily involves the existence of an assumpsit. But if a good cause of action is shown, it is immaterial, after verdict, to consider in what form it has been shown. In *Mountford v. Horton*, (a) an agreement was set forth without a promise. In *Nurse v. Wills* (b) a promise was stated, but not a promise to the plaintiff ; and in both the omission was aided after verdict. There are many cases in which a count may be good after verdict, to be read either in assumpsit or in case. All counts on bailments might be so framed. The breach shown would be either that of the breach of a duty or of a contract. Wherever case and assumpsit are concurrent remedies, that must be so. The only matters that are traversable are the acts between the persons ; the others are matters of form which, after verdict, become immaterial. If a good cause of action is shown, it is a good cause of action on the case ; for by the Statute of Westminster the subject is entitled to his writ on the case ;

and after verdict, the good cause of action being
 * 28 * shown, it is sufficient, though the action may sound in assumpsit.

The argument addressed by the other side to this point merely shows that case is not the proper remedy ; that there is no breach of a specific contract. But any argument that may be used to show that the declaration does not set forth a good cause of action in case, will show that there is a good cause of action in assumpsit, unless the existence of any cause of action whatever can be denied. The cause of action is properly laid here in case ; the breach arises from the relation between the parties, and that makes it a good cause of action in case. There is no reason for taking this case out of the general rule, that where agents and servants are entrusted with property of other persons for any purpose it is a fault in them to act contrary to their engagement : and though

(a) 2 New Rep. 62.

(b) 4 B. & Ad. 739.

assumpsit may be maintained against them in respect of a particular contract, case may also be maintained against them for a breach of their general duty.

Mr. Butt, in reply. — The declaration here only states that the goods were consigned to the plaintiff.

[LORD CAMPBELL. — Does not that mean that they were sent under a bill of lading, which put them under his control?]

They might have come to him as a general bailee, or in a different character. In none of the statutes is there any thing to impose on the broker, as broker, the liability here insisted on. It may be admitted that there is in the books some confusion between misfeasance and non-feasance; but here the circumstances plainly enough raise the distinction, and avoid the argument founded on that supposed confusion. There is no other reason given for adopting this form of action in the present case, than would * apply equally * 29 to justify the bringing an action on the case for not conveying a house and land, or for not paying a sum of money. Suppose a smith was to take a horse to shoe, undertaking to give it a feed of corn, could the smith be charged, on account of his general character of a smith, with not giving the horse a feed of corn? Certainly he could not. If the horse suffered injury while in his possession for want of food, the smith might be charged with not having taken care of the horse, and the not giving him a feed of corn might be given in evidence in proof of his neglect, but could not be made the subject of a distinct cause of action, upon any supposed general duty of the smith as such. In such a case, if the action was to be maintained at all, the count must be in assumpsit and not in tort. Then as to the case of stock-brokers: there is a distinction between them and other brokers. It is the duty of a broker to make a contract with respect to the sale of goods, and nothing more; he is not bound to see them properly transferred; but it is a part of the duty of a stock-broker, as such, to transfer the stocks he

has sold. That instance, therefore, is not in point here. The law, as laid down by Mr. Justice LITTLEDALE, in *Corbett v. Packington*, (a) has not been disputed on the other side, and the attempt to distinguish it from the present cannot succeed. In *Brown v. Dixon*, (b) the first count of the declaration was in trover; the second alleged that the plaintiff had delivered to the defendant a spaniel, to be seen and viewed by the defendant, and to be returned by him in a reasonable time to the plaintiff; that he did not return it, but took and * 30 carried away the spaniel, and detained * it until he lost it. The question in that case was, whether this special count was not a count on promises incapable of being joined with a count in tort; but as the breach was in respect of the unlawful keeping of the dog, which was a tortious act, the declaration was held good. It is clear that if a bailee has goods and misuses them, he will be liable for that misuse, for that has nothing to do with his contract; and so he will, if instead of goods an animal is entrusted to him, for there the law, independently of the contract, will imply a duty to do that which is necessary to its safety and its existence. But here the supposed duty is altogether one arising out of the contract and dependent on it, and the breach is nothing but a breach of that contract. *Coggs v. Bernard* (c) will not help the other side; for the real question is, whether the duty, the breach of which is complained of, would have arisen without an express contract. If it would not, the action for the breach must be founded on the contract itself. *Mast v. Goodson* (d) was an action on the case for disturbing a party in the enjoyment of an easement, and no other form of action was there maintainable. *Marzetti v. Williams* (e) is a case where the duty arose independently of the contract, upon the bare employment.

[LORD CAMPBELL. — Whether you declare in case or assumpsit, the declaration must state a contract; that is, something on which a promise or a duty arises. You say that if

(a) 6 B. & C. 268; 9 Dowl. & Ryl. 258.

(b) 1 T. R. 274.

(c) 2 Ld. Raym. 909; Comyns, 133; 1 Salk. 26.

(d) 2 Wils. 348; Sir W. Bl. 848.

(e) 1 B. & Ad. 415.

there is nothing more than a mere employment, case alone can be brought; that is, where there is no other evidence than that which would raise the implied contract. But looking at the face of this count, how can you tell whether it is to be * supported by showing a general employ- * 31 ment or a special contract?]

In *Marzetti v. Williams*, (a) the custom which raised the implied contract was stated on the face of the count.

[LORD CAMPBELL. — There is a difficulty in saying, in all cases, whether the obligation arises from a general employment or a special contract. If a declaration is against a surgeon, it would not be sufficient to say that one party was a patient, and the other was a surgeon; you must state what the surgeon was to do, and that he accepted the employment. So that you must show something of the nature of the contract, whether you proceed in assumpsit or in tort.]

In *Smith v. Lascelles*, (b) all the duty charged would have arisen from the mere employment, from the relation of the principal and agent; besides which, no question was there raised as to the form of the action; that case, therefore, is not in point. A factor who receives goods of his principal may be bound as a rule to insure the goods; but that being a general duty, does not arise from the particular contract, and this circumstance distinguishes that case from the present.

Then as to the other point: It is said that if the duty should be found to be incorrectly stated on the face of this declaration, the House would afterwards reject the statement, and treat the count as good. That might be so if the duty was a common-law obligation, which arose from the mere relation of broker and principal; but that is not the case here; it arises from a special contract between the parties.

[LORD CAMPBELL. — Does this declaration equally state the

(a) 1 B. & Ad. 415.

(b) 2 T. R. 187.

duty as a general duty, and as arising from a special contract?]

It does, and is therefore objectionable; for if it could
 * 32 only arise from contract, then this * form of action is not maintainable, and the statement which leaves it doubtful from what the duty arises is objectionable. This action will not lie for a mere non-feasance, yet a mere non-feasance is all that is complained of. *Elsee v. Gatward* (a) is a strong authority for the plaintiff in error. The Court there decided that the omission to do that which the contract imposed on the party the duty to do, would not give a cause of action in case. In *Burnett v. Lynch* (b) there was no contract between the parties; the plaintiff was the lessor, the defendant was the assignee, who had taken an assignment by deed-poll, and the question was, whether covenant was or not well brought under such circumstances; and as there was no contract but only a duty, it was held that case was the proper form of remedy.

It is clear that this is a bad count; and being so, it cannot be treated as good after verdict. It is not assisted by the Statute of Jeofails, which applies to objections of form only and not of substance.

[LORD BROUGHAM. — But there was a case of this kind. There was a contract allowing the plaintiff to take furze-bushes, but not before Michaelmas. The declaration did not say that he took them before Michaelmas, and objection was made thereon, but after verdict the allegation was considered sufficient. That was a declaration in assumpsit. *Hall v. Marshall*. (c)]

LORD CAMPBELL. — What is the objection to this count as a count in contract?]

That there is no express promise stated, nor any thing from

(a) 5 T. R. 143.

(b) 5 B. & C. 589.

(c) Cro. Car. 497.

which such a promise can be inferred. And secondly, that, whether as expressed or implied, the consideration is stated as an executed consideration. In *Savignac v. Roome*, (a) the count alleged * that the plaintiff's servant wilfully * 33 drove against the plaintiff's carriage, and this allegation was held after verdict fatal to the declaration; and it was further held that the Statute 16 & 17 Chas. 2, c. 8, only applied to cases that appeared, on the face of the declaration, as evidently intended to be actions of trespass, and not trespass on the case.

[LORD CAMPBELL. — To return to the question of the statement of the consideration; suppose there is a binding contract between the parties, and that that is shown, would not that be sufficient after verdict?]

No; there must be a legal consideration legally and properly set out.

[LORD CAMPBELL. — Where is there a case of a declaration, with a valid promise, being held bad for merely omitting to set out a breach of duty?]

Buckler v. Angel. (b) There it was stated that the defendant had agreed to surrender a term, and the defendant would be willing to pay 10*l*. After verdict for the plaintiff, it was objected that there was no promise set forth in the declaration.

[LORD CAMPBELL. — Certainly not; for “would be willing” was not an absolute promise; it was not a contract, but at most an offer to make one. That is not a case of a valid promise set out, but omitting to add a breach of duty.]

In *Lee v. Welch*, (c) the ruling in *Buckler v. Angel* was considered and acted on. There the defect was that there was no promise alleged, so as to show a foundation for the

(a) 6 T. R. 125.

(b) 1 Lev. 164; 1 Ld. Raym. 23.

(c) 2 Ld. Raym. 1516.

action. *Thomas v. Shillibeer and Morton* (a) is a case where, a contract not being sufficiently shown on the face of the declaration so as to render both the defendants liable, the judgment was entered for the defendant *non obstante veredicto*. In *Edwards v. Baugh*, (b) the declaration was

* 34 held bad * after verdict, as not showing a sufficient consideration for the promise, there being no allegation of any debt due, but merely that a dispute and controversy existed respecting it. *Tollet v. Shenstone* (c) is to the same effect. There the declaration stated that J. G. delivered to the defendant, a livery-stable keeper, a horse, to be kept for J. Y., and to be redelivered on request, on satisfaction of the defendant's demands; and it thereon became and was the duty of the defendant, on being paid his demand in respect of the horse, to redeliver it on the request of J. Y. Averment that J. Y. requested the defendant to redeliver the horse to the plaintiff, and that the plaintiff then paid the defendant all his demands in respect of the horse; yet that the defendant would not, when so requested, deliver the horse to the plaintiff, but wrongfully kept and detained it, &c., whereby the plaintiff lost the benefit, &c. It was held, on motion in arrest of judgment, that the count was bad, as not showing any duty in the defendant to redeliver the horse to the plaintiff; and that it could not be supported as an informal count in trover, the detention under such circumstances not amounting to a conversion. That case is precisely like the present, and unless overruled by the authority of this House, must govern the decision here. *Hayter v. Moat* (d) laid down the same rule. There the want, in an *indebitatus* count, of an allegation of a promise to pay, was held, after verdict, not to be cured by the effect of a plea of non-assumpsit to the whole declaration; or by a statement, at the commencement of the declaration, that the defendant was summoned to answer in an action on promises; or by the conclusion, that in

* 35 * consideration of the promises respectively before mentioned, the defendant promised to pay. It is hardly

(a) 1 M. & W. 124.

(b) 11 M. & W. 641.

(c) 5 M. & W. 283.

(d) 2 M. & W. 56.

possible that that case should be held to be erroneously decided ; and yet, if supported, the argument on the other side cannot be good. There is nothing here which can enable the defendants in error to take advantage of the verdict.

[LORD CAMPBELL. — The reason of that decision is plain ; no contract was set out there, and the promise to pay, if applicable at all, was applicable to the other counts, and not to the *indebitatus* count.]

The case of *Wise v. Wise* (a) is applicable to both points here. There an action on the case was held not to be maintainable, as the record showed that there was a contract, and the remedy was on that contract. These cases, it is contended, exemplify the rules under which this declaration must be held insufficient, and the judgment of the Court below must be reversed.

Mr. *Cleasby* was allowed to observe on the case of *Hayter v. Moat*, (b) which had been cited for the first time in the reply. — The declaration there did not state that the defendant was indebted to pay on request, but left it doubtful whether the allegation of indebted might not be a “debitum in præsentī, solvendum in futuro.” Mr. Baron PARKE there said: “You do not even state that the defendant was indebted to pay on request; it is quite consistent with your statement that he was to pay on six months’ credit. We must find premises stated on which the law will imply a promise to pay on request.” And Mr. Baron ALDERSON added, “You only state a *debitum*, not *solvendum in præsentī*.” That case is therefore inapplicable to the present.

* LORD BROUGHAM. — This case has been very ably * 36 argued, and great assistance has been given to the House by the arguments of the learned counsel at the bar, on the one side and the other. I am of opinion that there is set forth upon this declaration, as the learned Judges appear to have thought in the Court of Exchequer Chamber, a specific contract between the parties. The contract is that of the

(a) 2 Lev. 152.

(b) 2 M. & W. 56.

retainer and employment of the defendant, by the plaintiffs, to sell their oil to such persons as should become the purchasers thereof, for certain reasonable commission and reward to him the said defendant, in that behalf; that is to say, some proportion being kept between the price of the article and the reward; for that is the very force and effect of the term "commission," and that shows it to be discretionary, and in the nature of an executory contract. Then it is alleged that this retainer and employment were accepted by the defendant. It is then specifically alleged that the plaintiffs consigned to him certain oils, and that those oils being so consigned afterwards arrived in the port of London where he carried on the trade of a broker; that he had notice of the arrival of the said oils so consigned to him, and that he took upon himself the delivery of the ten tons of linseed oil in question, according to the terms of the said contract. I thought that perhaps that might mean according to the terms of the general contract made between him and his employers, but it is not so; it is the contract he had made with the purchasers of the oils, he having made a contract with those purchasers in virtue of his profession as a broker. A breach is then assigned, in a manner to which I understand there is no objection.

This being the case, it appears to me that the Court
* 37 * of Exchequer Chamber has come to a right conclusion; which renders it wholly unnecessary, in the view which I take of the case, to ask whether the Court of Queen's Bench was right in its view of the office of a broker, namely, that he was not to do more than to make contracts; that he was not to obtain a ready-money price for the goods he should sell, or even to sell goods consigned to him, which indeed is rather the office of a factor or a consignee than a broker. But a broker may be a factor or a consignee, and may contract with his employer not only to pass the property in goods, which is the proper office of a broker, but to receive the trust in the goods consigned; to have the control over those goods, which also is not the ordinary office of a broker; and to deliver those goods, and so to deliver them for such price as he might contract for, which in this case was a ready-

money price. The breach is that he did not deliver them, according to the terms of that contract, for a ready-money price, but on credit, whereby the plaintiffs were damnified to the extent of the price of ten tons.

Being of opinion that it is by virtue of the contract that the liability arises, and that the damage arises from a breach of that contract, it is wholly unnecessary to say whether it is within the ordinary employment of a broker that he should perform this duty, which was the ground on which the Court of Exchequer Chamber differed from the Court of Queen's Bench; the former Court holding that there was such a contract with the defendant, a broker, as rendered him liable, on a breach of that duty, to the party employing him, for an injury arising in consequence of his not having kept within the terms of his employment and undertaking.

* Then the question is, is this declaration, taking it * 38 altogether, sufficient to support the judgment of the Court of Exchequer Chamber? Is this declaration, after verdict, sufficient to show a contract, and a binding of himself by the terms of that contract, by this defendant, against whom the action is brought? I am of opinion that it is, and I think the authorities cited are quite sufficient for that purpose. The authorities show that, after verdict, it is immaterial whether there are or not technical words; if there are clear words to show that the defendant has made such contract and has broken it, after verdict every thing will be intended that can be intended to support that verdict. All matters of form will be got rid of, to get at the substance. If the substance had been insufficient, the result would have been different. If there had been no allegation of a contract; if, for instance, there had been no allegation of a consideration; if there had been no allegation of a breach, it might have been otherwise; although, indeed, if some of the cases in Comyns's Digest, under the head "Pleader," are to be relied on, there are cases where there seems such a tendency to support the verdict, that even where there was a most deficient statement of a breach, the Courts have overlooked that, to support the verdict. But it is not necessary here to go that length; it is sufficient to see whether there is an averment that the under-

taking of the defendant to the plaintiffs has not been fulfilled, and that loss has in consequence accrued to the plaintiffs.

Now in *Mountford v. Nelson*, (a) which has been cited at the bar, there was no doubt that an agreement existed, * 39 but it was said there was no promise at * all alleged; not only no promise to the plaintiff, but no promise at all; but the Court was of opinion that whatever might have been the force of that objection on special demurrer, there was sufficient to support the verdict.

In the case of *Nurse v. Wills*, (b) there was an agreement between the parties, but the promise was not stated to be to the plaintiff; nevertheless their Lordships held it was sufficient, after verdict, to support the action.

Then there is the case of *Hall v. Marshall*, (c) which goes a great way; in which the contract with the parties was to permit the plaintiff to take all the furze on certain premises, which he should cut, take, and carry away, on or before Michaelmas, 1635. The case only set forth the contract; and in assigning the breach, stated, — for on looking into it, it appears to have been an action of assumpsit, — in assigning the breach, stated that he was disturbed in taking away the furze, but did not state that he took away the furze, and was so disturbed in taking them away, on or before Michaelmas, 1635. That seems to me to make out a very strong case, as indicating the disposition of the Court, after verdict, to presume every thing which can be presumed to support it. I do not think that this case goes half so far as that; I should rather be disposed to say, that in that case there was more substantial ground for the objection than in this case, which, according to the view I take, does show a contract, and a breach of the contract: I am therefore of opinion, without referring to the other part of the case, that the judgment of the Court of Exchequer Chamber must be affirmed.

* 40 * I was at first staggered by the statement in *Hayter v. Moat*; (d) but, in the first place, the request was not

(a) 2 New Rep. 62.

(b) 4 B. & Ad. 739.

(c) Cro. Car. 497.

(d) 2 M. & W. 56.

enough to show the liability. It is not enough to say that the man is liable, and that a request was made; a request does not amount to a contract: but, secondly, I was satisfied by the answer given by *Mr. Cleasby*; for on looking to the very ground of the decision, the promise to make the payment "when thereunto requested," was not set forth; so that it was impossible to say whether the contract was performed or not. It is rather implied, that had it, after verdict, been set forth that he was to pay either on the *quantum meruit*, though no specific sum, and had it been further set forth that he had undertaken or was liable, and being indebted, had become liable to pay when called upon, that would have been sufficient. Upon the whole, I am of opinion with the Court below, and shall move your Lordships to give judgment for the defendant in error.

LORD COTTENHAM. — My Lords, I am of opinion that the Court of Error came to a right conclusion, and I concur with the reasons stated by my noble and learned friend. It appears to me perfectly clear that the declaration correctly states a case of neglect of duty. The action being an action of trespass on the case, it states that the defendant undertook, for a certain commission or reward, to sell for the plaintiffs certain quantities of linseed oil, and to deliver the same according to the terms of the contract of sale: then it alleges the contract, the terms of the sale being that the oil should be paid for on delivery.

Then with respect to the ten last tons of linseed oil, * which are the subject-matter of the action, it is alleged * 41 in terms, that the defendant delivered them without having received the money. The case, therefore, if stated at length, is that he had undertaken this employment for a commission, and had not fulfilled the duty he had undertaken; the declaration being in tort, which it is admitted would be the proper mode and form of action, if the duty to be performed had been an ordinary duty; and therefore the Chief Justice, in delivering the judgment in the Exchequer Chamber, concludes in these words: "Coupling together the terms of the particular contract made by the defendant, with the

terms of the defendant's retainer by the plaintiffs, we think it amounts to an express contract on the part of the defendant to deliver what he sold on the payment of ready money only; and that the duty of the broker arose from this express contract so stated in the declaration, and not simply from his character of broker." It appears, therefore, according to the facts, that the broker had undertaken the duties imposed upon him by virtue of the contract into which he had entered with the plaintiffs, and that he had neglected to perform the duties, by parting with the oil without receiving the money. The question raised is, whether the Court of Exchequer Chamber was in error upon this point. I think it was not. I am of opinion, that under these circumstances the remedy pursued in the present case was the proper remedy. The contract was specially made; and, on the authorities referred to, the broker's duty must depend upon the contract expressed or implied into which he entered, and it is difficult to conceive a case in which a contract of this sort must not be

special; it must have reference to the price of the
 * 42 goods, and the terms on which they are to be * sold; and it is difficult to conceive a case in which there is not something passing between the broker and his employer to regulate the contract. It is said that the proper form of proceeding is by an action of assumpsit, and not an action on the case. The cases referred to disprove that proposition altogether; and the terms of the Lord Chief Justice are, that this is a proper remedy where there are duties imposed upon the party, though they are imposed by an express contract, and are not what are called the ordinary duties imposed on brokers as such. That being the only ground on which the judgment of the Exchequer Chamber appears to have been impeached, I am of opinion that it fails, and that the judgment of that Court is correct, and ought to be affirmed.

LORD CAMPBELL. — My Lords, after having heard this case very ably argued on both sides, I have come to the conclusion that the judgment of the Court below ought to be affirmed. In the first place, I think this declaration sets out a sufficient cause of action; it alleges a binding contract

between the parties ; that the plaintiff employed the defendant as a broker for a certain reward to do certain things, and that he undertook that employment ; which is tantamount to saying that the plaintiff paid him a certain reward, and that he, in consideration of that reward, undertook that duty. The declaration then goes on distinctly to show a breach of that contract, because it alleges that the defendant having contracted that he would see the price of the goods paid, allowed the purchaser to receive them before they were paid for, whereby the plaintiff lost the value. Now that being the case, I think that, after verdict, it is immaterial to consider whether this count is framed in tort or in

* contract. It sets out a cause of action for which the * 43 plaintiff is entitled to recover. The cases referred to by the counsel for the plaintiff in error do not apply, because there is no question raised here as to misjoinder or damages, plea in abatement, or whether a verdict can be sustained against one defendant and not against another. There is only one count, and there is only one defendant ; and, after verdict, the question is whether the judgment shall be arrested upon that count, by reason that there is not an express promise to pay, or an express promise to perform the agreement. Now no case has been cited to show that the judgment should be arrested on such a ground. The only case applying at all was that case of *Hayter v. Moat*, which, until I heard the explanation of it, did appear to me to impeach the general doctrine for which I should contend, that if the count sets out a general contract, and a breach of that contract, after verdict the Court will not arrest the judgment on account of any defect of form in setting it out. But on examining that case, it appears to have been rightly decided ; for it does not show that there had been any breach of the contract, but the plaintiff merely alleged a conclusion of law, that the defendant was liable for goods supplied at his request, but that they were to be paid for at a future day, and it did not appear there that there had been any breach. I apprehend, therefore, that whether this count be in contract or in tort is quite immaterial ; it is a count on the case, setting out the circumstances and facts of which the plaintiff complains ; he shows

a cause of action, by showing a contract, a duty, and a breach ; and if so, it is a good count in an action on the case, and he is entitled to his judgment.

But then there is a question whether this count
* 44 * was a good count in law, and could not be demurred to. I think that the judgment of the Court of Exchequer Chamber is right, for you cannot confine the right of recovery merely to those cases where there is an employment without any special contract. But wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of a duty in the course of that employment, the plaintiff may either recover in tort or in contract. It is impossible to say that the whole of this is not connected with the duty of the defendant as a broker in this case. It is not the duty of the broker, unless there are words importing that he is to perform such a duty, to see to the delivery of the goods on the payment of the price. But it may be the duty of the broker, under the employment he has undertaken, to see to the delivery of the goods, and to take care that the price is paid ; and I apprehend, though that is connected with the capacity of a broker, an action being brought against him in that capacity, and the duty arising on a particular contract entered into between him and the plaintiff, the plaintiff has a right to declare either in contract or in tort, as he has done. Upon both these grounds, I think that the judgment ought to be affirmed.

Judgment of the Court of Exchequer Chamber affirmed, with costs.

* BOURNE v. GATLIFF.

* 45

1844.

RICHARD BOURNE and Others . . . *Plaintiffs in Error.*
 SAMUEL GATLIFF *Defendant in Error.*

Carrier. Evidence. Pleading. Costs. Practice.

A carrier by sea, under a bill of lading of goods "to be delivered in the like good order, &c., at the port of, &c., unto Mr. ———, or assigns, on paying for the said goods, freight, and charges as per margin, with primage and average accustomed," is not entitled immediately on the arrival of the vessel, and without notice to the owner, to land the goods; and if he should land them, and they should be destroyed, he will be answerable to the owner for the loss.¹

Evidence of former transactions between the same parties can be received for the purpose of explaining the meaning of the terms used in their written contract.²

A declaration consisted of two counts. The defendants pleaded six pleas; four to the first, and two to the second count. The plaintiff demurred specially to the third and fourth pleas, and generally to the sixth plea, and took issue on the others. The Court of Common Pleas gave judgment for the plaintiff on all the demurrers. The cause went to trial on the issues, and a verdict was found for the plaintiff on the issues raised on the first count: as to the issue on the second count, the jurors were discharged by consent. Judgment was afterwards

¹ See *McAndrew v. Whitlock*, 52 N. Y. 40; *Shepherd v. The Bristol & Exeter Railway Co.*, L. R. 3 Exch. 189; *Norway Plains Co. v. Boston & Maine R.R.*, 1 Gray, 263; *Moses v. Boston & Maine R.R.*, 32 N. H. 523; *Chicago & Rock Island R.R. Co. v. Warren*, 16 Ill. 502; *Blumenthal v. Brainerd*, 38 Vt. 402; *Alabama & Tennessee R.R. v. Kidd*, 35 Ala. 209; *Wood v. Crocker*, 18 Wis. 345; *Sessions v. Western Railroad Corp.*, 16 Gray, 132; *Chickering v. Fowler*, 4 Pick. 371; *Hamilton v. Nickerson*, 11 Allen, 309; *Chitty Contr.* (9th Eng. ed.) 456, 457 (11th Am. ed.) 708 and n. (k), 709–712; 3 Kent, 214–216; *Graves v. Hartford & N. Y. Steamboat Co. (Conn.)*, 12 Am. L. Reg. n. s. 23; *Barber v. Meyerstein*, L. R. 4 H. L. 317; s. c. L. R. 2 C. P. 38, 661; *Redmond v. Liverpool &c. Steamship Co.*, 56 Barb. 320; *Rome Railroad v. Sullivan*, 14 Geo. 277.

² See *Chitty Contr.* (9th Eng. ed.) 105.

entered for the plaintiff. On a writ of error, the Exchequer Chamber affirmed the judgment of the Common Pleas, except as to the demurrer to the sixth plea, which plea the Exchequer Chamber declared to be a sufficient answer in law to the second count. A general order was made for the defendants to pay costs to the plaintiff, but no order was made to except, out of these general costs, the costs of the sixth plea and the demurrer. The Exchequer Chamber awarded to the plaintiff costs under the statute, for delay in the execution of his judgment, by reason of the writ of error.

Held, that the Court of Exchequer Chamber ought not to have awarded the costs under the statute, and ought to have excepted the costs of the sixth plea out of the general costs awarded to the plaintiff.

In a declaration against carriers, one of the counts averred the contract to be to carry goods from D. to L., and to take care of them on landing them at a wharf there, and to deliver them to the plaintiff; the defendants pleaded that they did take care of the goods at the wharf till they were destroyed by fire without defendant's default.

Held, a good plea to the count.

This House pronounced the same judgment which the Court of Exchequer Chamber ought to have pronounced.

June 7, 10, 1844.

THIS was an action of assumpsit, brought in the Court
* 46 of Common Pleas by Samuel Gatliff against * Richard Bourne and others, upon a contract for the delivery of goods. The declaration contained two counts.

In the first count the plaintiff alleged in substance that he delivered to the defendants certain linen goods to be carried by them in their steam-vessel, the "City of Londonderry," from Belfast to Dublin, and there reshipped into their other steam-vessel called the "William Fawcett," and by it to be conveyed to London, and there delivered in good order and condition (all and every the accidents of the seas, steam navigation of whatever nature and kind excepted) unto the plaintiff or assigns, on paying for the same certain freight and charges, with primage and average accustomed; that the defendants in consideration of the premises promised to take care of, and safely and securely carry and convey, and deliver the said goods and merchandise as aforesaid; that the "William Fawcett" with the goods on board arrived at London; and that although a reasonable time for the delivery of the goods elapsed, and the defendants delivered part of them,

yet they did not deliver the residue or any part thereof, and so negligently conducted themselves with respect to it that it was lost.

The second count in substance stated a delivery by the plaintiff to the defendants, of linen goods to be carried by the "City of Londonderry ." to Dublin, and thence by the "William Fawcett" to London, and proceeded to aver, that in consideration of the premises and that the plaintiff, at the defendants' request, had employed them to take care of the goods at the wharf where they should be landed from the "William Fawcett," and to convey them from the wharf to the plaintiff's place of business in Ironmonger Lane, and deliver them there in a reasonable time after their landing, the defendants promised so to take care of * them at the * 47 wharf, and convey them thence to Ironmonger Lane, and there deliver them; that the goods were landed at Fenning's wharf, but that the defendants did not take care of them there, or convey or deliver them according to their promise, and so negligently behaved that the goods were lost.

The defendants pleaded in substance as follows:—1. *Non assumpserunt*. 2. To the first count; that they delivered the goods according to promise. 3. To the first count; that the goods were shipped on board the "William Fawcett" under the terms and conditions expressed in a bill of lading (the terms of which were set out); that, on their arrival in London, they were unshipped and deposited upon Fenning's wharf, there to remain till they could be delivered to the plaintiff or his assigns, according to the bill of lading, Fenning's wharf being a place where goods brought in steam-vessels from Dublin to London were usually deposited for the use of the consignee, and a fit place for that purpose; and that while the goods remained upon the wharf, and before a reasonable time for their delivery to the consignee had elapsed, they were burnt by an accidental fire which broke out on the wharf, without any default of the defendants. 4. To the first count; that on the arrival of the goods at London, on board the "William Fawcett," the defendants were ready and willing to deliver them to the plaintiff ac-

according to promise, but neither the plaintiff nor his assigns were there ready to receive them, whereupon the defendants landed them on Fenning's wharf, to remain there till the plaintiff or his assigns should come and receive them, or till they could be conveyed or delivered to the plaintiff or his assigns,

Fenning's wharf being a place where goods conveyed by
 * 48 steam-vessels from Dublin to London * were usually landed and deposited, and being a fit place for that purpose; and that while the goods were deposited there, and before the plaintiff or his assigns came or sent for them, or a reasonable time for carrying them to him had elapsed, they were burnt by an accidental fire which broke out on the wharf, without any default of the defendants. 5. To the second count; that the defendants did not take the goods into their possession for the purpose stated in that count. 6. To the second count; that the goods were shipped under the terms of a bill of lading (which was set out) (a); that on their arrival they were safely landed and stored at Fenning's wharf, being a wharf where goods conveyed in steam-vessels from Dublin to London were usually deposited, and a proper place for that purpose, and remained there until, &c., and afterwards and before a reasonable time for conveying them to the plaintiff had elapsed, they were consumed by a fire which accidentally broke out on the wharf, without any default on the part of the defendants.

The plaintiff in his replication took issue upon the first, second, and fifth of the above pleas. To the third and fourth he demurred specially, and to the sixth he demurred generally.

The Court of Common Pleas, in Hilary term, 1838, gave

(a) The freight bill contained the following stipulation: "Goods not taken away within three days after landing (or sent home and refused) are stored at the expense and risk of the consignee."

The bill of lading, after describing the goods, stated the contract in the following terms: "To be delivered in the like good order and condition, at the aforesaid port of London (all and every the dangers of the seas, &c., excepted), unto Mr. Samuel Gatliff or assigns, on paying for the said goods freight and charges as per margin, with primage and average accustomed."

judgment for the plaintiff upon all the demurrers. (a)

The issues of fact were tried on the * 18th November, * 49 1839, before Lord Chief Justice TINDAL, when it appeared that the ship arrived at London at two in the afternoon of Sunday, the 28th August, and was reported at the Custom-house at 10 o'clock on the next morning; the goods were landed at a wharf called Fenning's wharf, without notice to the plaintiff, between the hours of eleven and four on the 29th of August, and on that night were destroyed by an accidental fire.

Evidence oral and documentary was given on the part of the plaintiff, that the goods mentioned in the declaration were shipped at Belfast, under two bills of lading; that the defendants had on previous occasions conveyed goods by sea for the plaintiff, and had usually delivered to him a printed bill of freight and charges, which was in the ordinary form. Another printed bill of freight and charges was produced, which was stated by a witness to relate to some former dealing between the plaintiff and defendants, and contained a blank, of which he offered a parol explanation. The counsel for the plaintiff proposed to read to the jury this last mentioned bill of freight and charges, and other bills of freight and charges, and other bills of lading, none of them relating to any of the goods in question in this cause, but to other goods conveyed by the defendants for the plaintiff; and also to give parol evidence of the mode in which the defendants had delivered other goods conveyed by them for the plaintiff from Ireland.

The counsel for the defendants objected to the admission of such bills of freight and charges, and bills of lading, in evidence; and to the admission of such parol evidence.

The Lord Chief Justice admitted the evidence, whereupon the counsel for the defendants excepted.

* The evidence for the defendants chiefly went to * 50 show that Fenning's wharf was a proper place at which to land goods, and was so used by many of the steam-vessels coming to the port of London. The defendants' counsel in-

(a) See 4 Bing. N. C. 314; 1 Arnold, 120; 5 Scott, 687.

sisted that, on the whole case, the defendants were entitled to the verdict, and that the Lord Chief Justice ought so to direct the jury: and likewise that the Lord Chief Justice ought to direct the jury that a delivery at Fenning's wharf was a sufficient delivery under the bills of lading. And it was further contended for the defendants, that if the goods comprised in the bills of lading could be considered as having been in the defendants' hands at all, after their unshipment on Fenning's wharf, they must be considered as having been in their hands as wharfingers and not as carriers, and, therefore, that they were not liable to loss by accidental fire.

The Lord Chief Justice declined so to direct the jury, but directed that the question raised by the pleadings on the first count of the declaration; viz., whether there had been a delivery of the goods in the said first count mentioned, was a question for the consideration of the jury; and that the jurors were to say whether, upon the whole of the evidence laid before them on both sides, a delivery at Fenning's wharf, of goods shipped under the bills of lading which had been given in evidence, was a delivery according to the usage and practice of delivering goods, observed in the port of London; that if, upon consideration of the evidence, they were of opinion that the delivery at Fenning's wharf was not a delivery under such bills of lading according to such usage and practice, then they were to find their verdict for the plaintiff, with the amount of damages sustained by him; but that

if they thought the delivery at Fenning's wharf was a
 * 51 * delivery under the bills of lading, according to the usage and practice observed in the port of London, then they were to find their verdict on the first count for the defendants.

Exceptions were taken by the defendants' counsel to this direction.

A verdict was found for the plaintiff on the first and second issues, which were raised on the first and second pleas to the first count. As to the issue raised on the fifth plea, which was pleaded to the second count, the jurors were discharged from giving any verdict. On the two issues thus found for the plaintiff, the damages were assessed at 780*l*. Judgment

was given for the plaintiff for the damages found by the jury, with 73*l.* costs.

On this judgment the defendants below brought a writ of error in the Exchequer Chamber, where the judgment of the Court of Common Pleas, so far as it applied to the demurrer to the sixth plea, was reversed, but was affirmed in other respects, and costs were awarded to the plaintiff. (*a*)

This judgment of the Exchequer Chamber was entered on the roll as follows:—

Whereupon all and singular the premises having been then and there considered, &c., it appeared to the said Court of Exchequer Chamber that there was no error in the record or proceedings aforesaid, or in giving the judgment aforesaid as to the said first count of the said declaration; therefore it was considered by the said Court of Exchequer Chamber there, that the said judgment aforesaid, in form aforesaid given as to the said first count, that was to say, the judgment in form aforesaid given, that the said plaintiff should recover against the said defendants * his said * 52 damages, costs, and charges, amounting in the whole to 1516*l.*, should be in all things affirmed, and stand in its full force and effect, the said matters above for error assigned in any ways notwithstanding. And it was further considered by the same Court, that the said plaintiff should recover against the said defendants 311*l.* by the said Court of Exchequer Chamber adjudged to the said Samuel Gatliff, and with his assent, according to the form of the statute in that case made and provided, for his damages, costs, and charges, which he hath sustained and expended by reason of the delay in the execution of the judgment aforesaid as to the said first count, on pretence of the prosecution of the said writ of error: but because it further appeared to the said Court of Exchequer Chamber that the said plea by the said defendants lastly above pleaded, was sufficient in law, therefore it was considered by the said Court of Exchequer Chamber, that the said last plea was sufficient in law to bar the said plaintiff from maintaining his said action against the said defendants,

(*a*) 3 Scott's New Rep. 1; 3 Man. & Gr. 643.

as far as related to the said second count, and that the said defendants should go thereof without day," &c.

Upon this judgment the defendants (now the plaintiffs in error) brought a writ of error to this House, and assigned errors to the following effect: "That the declaration and the matters therein contained are not, nor is any part thereof, sufficient for the said S. Gatliff to have or maintain his aforesaid action: that the judgment appears to have been given in the Common Pleas for the plaintiff, whereas it ought to have been given for the defendants: that the judgment as to the first count of the declaration, that Gatliff should recover

against the defendants his damages, costs, and charges, * 53 amounting in the * whole to 1516*l.*, was affirmed by the

Exchequer Chamber, whereas it ought to have been reversed: that it was adjudged by the Exchequer Chamber that Gatliff should recover against the defendants the sum of 811*l.*, by reason of the delay in the execution of the judgment of the Common Pleas: that the direction of the Judge was wrong, and that the bill of exceptions ought to have been allowed." The prayer concluding this assignment of errors was, "that the judgment of the Court of Common Pleas, and the affirmance thereof as to the said first count, for the errors aforesaid, and for other errors in the said record and proceedings being, may be reversed, and that the defendants may be restored what they have lost by reason of the said judgment and affirmance thereof."

Mr. Kelly and *Mr. J. W. Smith*, for the plaintiffs in error. — The plaintiff below says that the defendants were bound, by the terms of this bill of lading, to deliver the goods to him wherever he might be, or to wait a reasonable time in the river till he sent for them. The first question may be taken to be, whether the master of a foreign ship, for such this vessel must be considered, can, on arriving in the port of London, land the goods in a convenient and customary place, and then be relieved from responsibility on their account? Here the bill of lading does not specify the place of delivery, nor a time of delivery, nor the person to whom the delivery must be made. The second question is, whether, under a bill of

lading in the ordinary form, evidence is admissible of former transactions between the same parties; that is, of former conveyance of goods by the same vessel to the same consignees, so as to give a meaning to the terms of the bill of lading? These are the main * questions in the case * 54 itself; but there is another matter arising on the form of these proceedings, and on which the plaintiffs in error say that the judgment ought to be reversed. The Court of Common Pleas gave judgment for the plaintiff below on demurrers to three several pleas. A trial then occurred, at which a bill of exceptions was tendered, and a verdict was found, and a general judgment was given on the verdict and the demurrers, and a general sum was awarded for the damages and for the costs. A writ of error was then brought in the Court of Exchequer Chamber, where the judgment of the Court of Common Pleas was affirmed as to two of the demurrers, but reversed as to the judgment on the demurrer to the sixth plea, which applied to the second count only. The reversal becomes important in this way: the judgment of the Court of Common Pleas was for one sum for damages and costs, and in that sum was included the amount for the plaintiff's costs on the demurrer to the sixth plea. The Exchequer Chamber ought to have given these costs to the defendants; but in the judgment there, though part of the judgment in the Common Pleas was reversed and part affirmed, yet the Exchequer not only did not give them, but did give the double costs of the writ of error under the Statute (13 Ch. 2, Stat. 2, c. 2, § 10), as if the writ of error had been frivolous.

[LORD CAMPBELL.— Would not that show this to be an appeal for costs?]

No; it is the same as if the judgment was bad in part and good in part: being bad in part, it must be reversed. The plaintiffs in error therefore ask that the judgments of the Common Pleas may be reversed, and that part, at least, of the judgment of the Court of Exchequer Chamber may also be reversed, or, supposing this House to be * of * 55 opinion that the Judges of the Court of Common Pleas

were right on the question of the delivery of the goods, still the judgment of the Court of Exchequer ought to be reversed, so far as it gives to the plaintiff in the action his costs on the demurrer, when the judgment in his favour upon the demurrers has been in part reversed. It is submitted that this, at least, ought to be done, but that, in fact, the whole judgment is erroneous, and ought to be reversed.

[LORD CAMPBELL. — Then do you mean to contend that the master may land the goods instantly, and sail away with the next tide ?]

That is the point contended for. Where he has received the goods on a general bill of lading, as in this case, he is not bound to give any notice to the consignee, who is himself bound to be watching for their arrival. This is a bill of lading which applies to all cases of goods sent to this country. The bill of lading never specifies the residence of the consignee; sometimes it makes the goods deliverable to the shipper or his assigns. In all cases whatever they are made deliverable to “ assigns,” and it frequently happens that they pass through several hands before the arrival of the ship. It may be that the person possessed of the bill of lading not only is not known to the master, but he may be resident at Liverpool, or elsewhere at a distance. It is consequently the duty of the consignee, or his agent, to seek out the vessel and demand the goods. The mode of proceeding easily enables him to do this; the usages of trade in this particular matter are most perfectly understood.

[LORD CAMPBELL. — You must go the length of alleging that the instant the master arrives he may, without notice to the consignee, land the goods. Where is the authority for that proposition ?]

* 56 There ought * rather to be a demand for an authority to show that he cannot do so.

[LORD BROUGHAM. — The fourth plea does not state that
[48]

the goods were landed at a place where the consignee could have got them whenever he pleased.]

That is implied in law. The plea describes the place as a usual and accustomed and fit and convenient place at which to land goods. There is no necessity for notice of the master's intention to land them.

[THE LORD CHANCELLOR. — Suppose the ship arrives in the middle of the night?]

That makes no difference. *Harman v. Clarke* (a) shows that the consignee must watch the arrival of the vessel, and is not entitled to notice from the master. It is plain that ships coming to the river cannot remain in it; the river would be choked up.

[THE LORD CHANCELLOR. — You must maintain that the master may unload instantly, and put the goods on a wharf, without any notice to the owner, or without any delay on his part.

LORD BROUGHAM. — And that you may thus throw on him the charge of wharfage, which, on receiving reasonable notice, he would be prepared to avoid.]

The captain only subjected himself to wharfage by landing the goods; the owners of them could obtain them on paying the freight, primage, and average, according to the bill of lading. It will be impracticable to make the master wait till the goods are demanded at the ship's side. It has been held that the consignee must watch the arrival of the ship, — a decision totally opposed to what is now supposed to be the duty of the master. *Hyde v. The Trent and Mersey Navigation Company*. (b) An undertaking to carry goods from a place to Manchester was held there to make the carriers liable for a fire which happened while the goods were in the

(a) 4 Camp. 159.

(b) 5 T. R. 389.

* 57 * course of transit to Manchester. The case is not in point, but the observations of Lord KENYON are. His Lordship said : (a) “ The owners of ships bring goods from foreign countries to merchants in London ; are they bound to carry the goods to the warehouses of the merchants here, or will they not have discharged their duty on landing them at the wharf to which they generally come ? It would be strange indeed, if the owners of a West Indiaman were held liable for any accident that happened to goods brought by them to England, after having landed them at their usual wharf.” It is clear that he contemplated the immediate delivery of the goods at the wharf ; he did not think of the master waiting a reasonable time in the river for the goods to be demanded. The point was put still more emphatically by Mr. Justice BULLER, who said : (b) “ When goods are brought here from foreign countries, they are brought under a bill of lading, which is merely an undertaking to carry from port to port. A ship trading from one port to another has not the means of carrying the goods on land ; and, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier.” In no case will be found any thing of the duty of the master to wait for a reasonable time ; such a duty would be incompatible with business. Some goods will be on the top, some at the bottom of the vessel : if the master must wait a reasonable time, how can he deliver the goods at the bottom of the vessel, while he is waiting a reasonable time for the owner of the goods which have been stowed at the top ? A rule that he must wait, would fetter commerce to a most inconvenient degree.

* 58 Suppose * there were fifty consignees, all or the greater part might be put to inconvenience by waiting the supposed reasonable time for the owner of one parcel of goods. The master has a right to land the goods at once, and the owner ought to be ready on the arrival of the vessel to receive them, and so protect himself against the charge of wharfage. Mr. Justice GROSE, in the same case, observes : (c) “ The case

(a) 5 T. R. 395.

(b) 5 T. R. 397.

(c) 5 T. R. 400.

of foreign goods brought to this country depends on the custom of the trade, of which persons engaged in it are supposed to be cognizant. By the general custom, the liability of carriers is at an end when the goods are landed at the usual wharf."

[THE LORD CHANCELLOR. — If this is a custom, you should have averred the custom.

LORD CAMPBELL. — Your pleas to the first count do not show a performance, nor an excuse for non-performance.

LORD BROUGHAM. — Nor, except in the fourth plea, a readiness to deliver ; but there you have not alleged a reasonable time.]

That is so ; but there need not be an averment of reasonable time.

[LORD CAMPBELL. — The case of *Harman v. Clarke* (a) does not support your argument. There is, in fact, no authority for it.]

There ought to be an authority shown for the other rule.

[THE LORD CHANCELLOR. — This is a contract to deliver. The owner of the goods is at London, and could conveniently receive notice ; or if at Liverpool or any other distant place, would have an agent here, to whom notice could be given. Can the master be discharged by immediately landing the cargo without notice ?]

He can. In the case of foreign ships, by delivery at a wharf in London the master is discharged. (b) That being so, the other party must interpose an authority to show that
* there must be a delay. That was a lawful delivery. * 59
Fenning's wharf was expressly proved at the trial to be

(a) 4 Camp. 159.

(b) Abbott on Shipping, 261, 4th edit.

a fit and usual and convenient place for the landing of goods. There is another passage upon this point, in Abbott: (a) “If the consignee sends a lighter to fetch the goods, it seems that the master of the ship is obliged, by the custom of the river Thames, to watch them in the lighter until the lighter is fully laden; and he cannot discharge himself from this obligation by declaring to the lighterman that he has not hands to guard the lighter, unless the consignee consent to release him from the performance of it. But it has been much contested, whether the master, is by the usage, bound to take care of the lighter after it is fully laden, until the time when it can properly be removed from the ship to the wharf.” That passage shows that the consignee must be ready. If the consignee does not wait the arrival of the ship, the master may proceed at once to land the goods, and to discharge himself from his liability on the bill of lading, under the provisions of which he is only liable for the carriage of the goods from port to port.

[THE LORD CHANCELLOR. — The captain took the goods on board for delivery in the port of London; he had no right to change the risk till they were delivered. No answer is given to that part of the case, which, therefore, resolves itself into a question of costs.]

Then as to the second point, the admission of the evidence: The question is, whether the evidence given at the trial, of prior transactions, is evidence to show what is the meaning of this word “delivered.” It is submitted that it is not
 * 60 admissible for such a purpose. * Evidence was offered of transactions of delivery by carts in the streets of London. It may be a question whether landing at a wharf is a delivery at the port of London; but the evidence offered is of transactions ultra the bill of lading, and this was given under the first count. The general custom had not then been set up; the defendants had not pleaded any custom. The plaintiff had simply put in a bill of lading; the evidence

(a) Abbott on Shipping, 261, 4th edit.

offered as to former transactions had nothing to do with the bill of lading; and this evidence is to amplify the conditions and nature of the contract. It comes within the case of *Yates v. Pym*. (a) It goes to show that under a contract for delivery at the port of London, for freight, primage, and average, the party is bound, for freight, primage, and average, to deliver in the port of London, and convey along the streets to a particular place in the city of London. It is impossible to give the contract such an extended construction. In *Yates v. Pym*, which was an action on a warranty of a sale of prime singed bacon, evidence was offered to show that by a practice in the bacon trade, bacon to a certain degree tainted was received as prime singed; and of another practice, by which the purchaser was precluded from all remedy if he did not discover and point out the defect by an early day. Lord Chief Justice GIBBS there said, "I cannot think that any custom of trade can be admissible to prove the proposition now contended for; and my brother HEATH (who had rejected the evidence at the trial), for whose opinion we have always felt such a just deference, was right in this, as he was in most other cases that ever came before him." The contracts are completely separate. Evidence * might be given to * 61 show what, under a contract for delivery in the port of London, was the usage of the port as to delivery in a certain part of the port, but not evidence of what had been done in previous transactions between these parties in conveying goods from the limits of the port to another place. Suppose in other transactions the parties had, under a similar contract to this, not only brought the goods to the port of London, but had carried them on to York and Liverpool, no evidence of that fact could be received to show what was to be done on a single contract to deliver in the port of London. Such evidence is, in fact, to amplify and enlarge the contract, not to give its terms a sensible meaning. It is therefore inadmissible.

Now as to the point whether the defendants are liable as carriers or wharfingers: If the goods, when landed on the

(a) 6 Taunt. 446.

wharf, were still in the possession of the defendants, they were so in the character of wharfingers, and not of carriers, and this action is not maintainable against them. If the goods had been burnt on board ship, the master would not be liable under the statute. The ship-owner contracts to bring the goods to London, and to deliver them in the port of London. If, when on the wharf, the goods are still to be considered in his possession, then the statute protects them, and he holds them as wharfinger.

[THE LORD CHANCELLOR. — If he should wrongfully put them on shore, would he not be responsible for that?]

He might be, but not in this way.

[THE LORD CHANCELLOR. — You have wrongfully put them on shore; you must excuse yourself for the consequences.]

We excuse ourselves in this way: we say he is not liable as a carrier. In *Garside v. The Proprietors of the Trent and Mersey Navigation*, (a) * a common carrier between A. and B., employed to carry goods to B. to be forwarded to C., carried them to B., and put them into his warehouse there, where they were destroyed by an accidental fire before he had an opportunity of forwarding them: he was held not liable for the loss. *In re Webb, Wallington, and Others*, (b) is a case to the same effect.

In the second count there is an allegation of a contract to convey the goods from Ireland to London; but there is a further allegation of a contract to convey them to the plaintiff's warehouse in Ironmonger Lane, where, on payment of the freight and the cartage, the goods would have been delivered to the plaintiff. On this the question which arises is, what was the character in which these defendants held the goods at Fenning's wharf? Here the evidence, improperly admitted in another part of the case, becomes of importance to the defendants. The contract stated in the second

(a) 4 T. R. 581.

(b) 8 Taunt. 448.

count is to carry the goods to Ironmonger Lane, and is, therefore, wholly distinct from the other. Under that count it is clear that after the arrival in the port, they held the goods as warehousemen or wharfingers ; and it may be contended that it was in performance of the second contract that the goods were landed. There was, therefore, no necessity for them to wait for a demand of the goods. There was, in fact, under the second count, no right of delivery elsewhere than at Ironmonger Lane. The plaintiff cannot use the evidence and reject it ; he cannot say that the defendants have broken the contract for delivery at the port of London, and then charge the defendants with a non-delivery at Ironmonger Lane. Being landed *for the latter purpose, * 63 the defendants were no longer in the character of carriers but of wharfingers. If the contract is to convey from Belfast to Ironmonger Lane, the landing at Fenning's wharf was in performance of that contract. In some part of the transit the defendants change their character. *Garside v. Trent and Mersey Navigation* is here distinctly in point. When the goods were there at Manchester, they were held to be in the possession of the Navigation Company as wharfingers, and not as carriers. It is exactly so here.

Then as to the last point in the case, the error of the Court of Exchequer Chamber as to the costs. There was a declaration consisting of two counts : the first alleged a contract to convey to the port of London ; the second a contract to convey to London, to take care of the goods when landed, and to convey them thence to the plaintiff's place of business in Ironmonger Lane, and there to deliver them. There were several pleas. The first was the general issue ; the second alleged a delivery ; the third, a deposit of the goods at Fenning's wharf, a place alleged to be a fit and convenient place for such a purpose, and their destruction there by an accidental fire without any default of the defendants ; the fourth, the arrival of the goods in London and defendants' readiness to deliver, but that the plaintiff was not ready to receive, wherefore they were landed at Fenning's wharf, being a fit place for that purpose, and there destroyed by an accidental fire ; the fifth plea was a plea to the second count, and denied that

the defendants received the goods for the purposes stated in that count; the sixth plea alleged that the goods were received under a bill of lading (which was set out), were

landed at Fenning's wharf, a fit place for that purpose,

* 64 and were there * destroyed by an accidental fire. Issue

was taken on the 1st, 2d, and 5th pleas, and the defendants demurred specially to the 3d and 4th, and generally to the 6th plea. On the demurrers there was judgment for the plaintiff, the Court of Common Pleas holding that the 3d and 4th pleas were bad, for not showing either that a reasonable time had been allowed to elapse after the ship's arrival, and before the landing of the goods, in order to give time to the plaintiff to claim and receive his goods from alongside the vessel; or that the landing of the goods in the manner alleged in the pleas was according to the custom of the port of London. As to the 6th plea, the Court held that during the whole of the time that the goods were in the possession of the defendants, they were in the situation of common carriers, not clothed with one degree of responsibility whilst taking care of the goods at the wharf, and another and different degree of responsibility whilst conveying the goods from it; and that consequently, as common carriers, they were bound to deliver the goods at all events, except in the two cases of loss by the act of God or the Queen's enemies. On the issues in fact, the parties went to trial. There was a discharge of the jury as to the issue on the second count: on the issues raised by the pleas to the first count, the verdict was for the plaintiff. Such being the state of the pleadings and the findings, the plaintiff became entitled in the Court below to the costs of the demurrers, under the 3 & 4 Will. 4, c. 42, § 34. When the case went before the Court of Exchequer, the defendants had judgment on the sixth plea, and having judgment so far in their favour, were entitled to the costs of that plea. They ought, therefore, not only to have been relieved from the costs of that plea in the Court

* 65 below, but to have received the costs upon * it: yet the

Court of Exchequer Chamber expressly affirmed the judgment of the Court below as to all the costs, and declared, in the most plain and direct terms, that that judgment should

stand for "damages, costs, and charges, amounting in the whole to 1516*l*." Now as that sum included every thing that could by possibility be payable to the plaintiff on a judgment wholly in his favour, it included of necessity those costs which had been incurred on account of the demurrer to the sixth plea. And in order to show more strongly and distinctly that such was the case, the judgment of the Court of Exchequer Chamber went on to declare, that the defendants, who had complained of the judgment of the Court of Common Pleas, should pay to the plaintiff the sum of 811*l*. for damages and costs occasioned to him by reason of the delay in the execution of the judgment of that Court. Such costs ought not to have been awarded to the plaintiff, unless the execution of the judgment obtained by him had been unduly delayed. There is no pretence for presuming that that was the case: indeed the judgment of the Court of Exchequer expressly denies that presumption, for it declares that the sixth plea was sufficient in law for maintaining his action. It is clear that this judgment is bad; for while it reverses the judgment of the Court below, as to part of the suit itself, it gives double costs for the delay occasioned by the writ of error, and affirms the whole of the judgment of the Court below as to the costs there.

[LORD CAMPBELL. — What do you say ought to have been the form of the judgment?]

It ought to have reversed the judgment of the Court of Common Pleas, for that is one entire judgment. Here was one judgment before the Exchequer Chamber for damages and costs: it was erroneous as to part: it * was * 66 impossible to reverse it for the damages, without reversing it for the costs. A part of these costs must have been the costs on the demurrer to the sixth plea, with regard to which it appears by the judgment of the Court of Exchequer Chamber that the judgment of the Court of Common Pleas was erroneous. The judgment for the costs on that plea ought also to have been set aside.

Mr. Erle. — In point of fact, these costs are included in a sum of 6*l.* offered to be paid back by the plaintiff: in point of law, they are not included in this record. The Exchequer Chamber affirmed the judgment of the Court below on the first count. The plaintiff offered the sum of 6*l.* on account of the plea to the second count; but the defendants, in order to raise this question, refused to accept it.

[LORD CAMPBELL. — Are you prepared to contend that these costs of the plea, which the Court of Exchequer Chamber has declared to be sufficient in law, are not included in the 734*l.* ?]

They ought not to be so considered: the plaintiff has offered to repay them.

The counsel for the plaintiffs in error continued: — The objections on the matter of costs are, first, that costs have been wrongly given against the defendants below; secondly, that they have not had given to them the costs that they are entitled to; and thirdly, that they have been wrongly made liable to double costs, when they had no remedy against a judgment, part of which is declared bad, except that of taking it into a Court of Error.

This House has no power to set right what has been done, but must reverse the judgment of the Court of Common Pleas, or must award a *venire de novo*. The House
 * 67 may, perhaps, award such a judgment as the * Court of Exchequer Chamber, as a Court of Error, might have given; but not upon the point of the costs.

[LORD CAMPBELL. — Whatever the Court of Common Pleas might do, the Exchequer Chamber might; and this House may do what the latter Court might have done.]

That proposition, like many others, is not to be understood in vague and general terms; but even if correct as now stated, it would not affect the question of the amount of

costs. This House has no more power over the amount of costs given in the Court below than over the amount of damages. The House may declare that a party is not entitled to any damages, but cannot question the amount.

[LORD CAMPBELL. — The Court of Common Pleas cannot change the damages, but it may change the costs.]

The House can no more assume the functions of a taxing-master than it can assume those of a jury. It cannot tax costs.

[THE LORD CHANCELLOR. — We can do it in this way: we can direct our officer to tax the costs, upon consultation with the taxing-officer of the Court of Common Pleas.]

But the difficulty here is, that by the form of the *postea*, though a distinction is there taken between damages and costs, yet but one sum is given to cover both. The judgment must, therefore, be set aside; *Everard v. Patteson*, (a) where it was held, that where an entire judgment is given for the plaintiff on two counts, one of which is bad, the Court must reverse it as to the bad count.

[LORD CAMPBELL. — But these are only the original costs found by the jury; they are not the costs *de incremento*.]

These are costs found by the Court. The costs of the demurrer to the sixth plea are those which were given against the defendants, and those costs never came before a jury. The judgment of the Court * of Com- * 68 mon Pleas ought to have been reversed in the Exchequer Chamber, and the proper judgment substituted. *Gildart v. Gladstone*, (b) the marginal note of which is to this effect: Judgment having been given in the Common Pleas for the plaintiffs upon a special verdict on assumpsit, which was reversed in this Court, the defendant is entitled

(a) 6 Taunt. 625; 2 Marsh. 304.

(b) 12 East, 638.

here not only to judgment of acquittal, but also to the costs of his defence in Common Pleas, being the same judgment which the Court below ought to have given; the defendant in such case being entitled to his costs by the Stat. 23d Hen. 8, c. 15. That Statute of Hen. 8 gives either party the costs of a verdict found in his favour: but on a special verdict, the Court gives the judgment as upon the verdict.

[LORD CAMPBELL. — In this House, though we may not give the costs of the appeal to the Exchequer Chamber, we may give the costs which ought to have been given in the Court below.]

By giving the judgment which the Court below ought to have given, but in no other manner. In *Gildart v. Gladstone*, Lord ELLENBOROUGH said, (a) “ The Court is bound, *ex officio*, to give a perfect judgment upon the record before it. In this case the judgment below was given for the plaintiffs upon a special verdict, where, of course, there was an alternate finding by the jury, according as the Court should be of opinion that the verdict and judgment ought to have been for the plaintiffs or for the defendant. This Court having then been of opinion that the judgment of the Court of Common Pleas was erroneous, and ought to have been for the defendant below, which would have entitled him there to his costs on the verdict as found for him, we should not do him all

* 69 the justice which he is entitled to * receive upon the record now before us, if we did not, upon reversing the judgment below, give the same judgment which the Court below ought to have given; which is a judgment for the costs of his defence in that Court, as well as a judgment of acquittal.” That being so, how could the Exchequer Chamber give double costs against the defendants? A wrong judgment had been given against them, and they had no means to correct it but by a writ of error. The defendants were not wrong in bringing up the whole record, when in fact they only complained of part of it: they could not get

(a) 12 East, 671.

that bad part corrected but by a writ of error, which of necessity brought up the whole of the judgment.

[THE LORD CHANCELLOR. — That point is quite clear.]

The order for the defendants to pay double costs was, therefore, erroneous.

As to the costs on the demurrer, the defendants were entitled to them before the 3 & 4 Will. 4. They were entitled to costs under the Statute of Anne: Hullock on Costs; (a) but they were also entitled under the 3 & 4 Will. 4. The statutes under which the defendants claim the costs are, the 3 H. 7, c. 10; the 19 H. 7, c. 20; the 13 C. 2, Stat. 2, c. 2, § 10; and the 4 Anne, c. 16, § 25. All these statutes give costs to a defendant in error, by reason of the wrongful delay of execution. Now, as error cannot be brought on part of a record, but the whole record must be brought up though only a part of it may be really impeached, the execution is shown to have been lawfully delayed when that part is declared to be bad, and the delay is no fault of the party who takes the case into error, for he was obliged to do that in order to get the bad part reversed.

THE LORD CHANCELLOR. — There is no foundation * for the objection to the direction of the Judge respecting the admissibility of the evidence. That evidence * 70 was not offered for the purpose of extending or narrowing the contract, or in any way changing it; but for the purpose of meeting a case which might be made on the other side to establish a custom of delivery at a wharf. It was to explain the meaning of the contract, by showing what had been the meaning of the parties. It is said that the evidence offered was that of instances of individual contracts. Be it so. That does not render the evidence the less admissible: it may be open to observation upon that ground, but it is not inadmissible. With respect to the other point, I desire to express my opinion in concurrence with the other noble and learned

Lords now present, that the contract was to deliver to the consignee in the port of London; instead of this delivery taking place, the goods were placed on the wharf. It was necessary to aver something to show that that was a delivery to the party entitled; but nothing of that sort is averred. I agree, therefore, on these two points with the Judges in the Court below; the only remaining question is as to the costs.

LORD CAMPBELL. — The fourth plea is clearly bad. It professes to show some excuse for the non-performance of the contract, but it shows none. It does not even show that a reasonable time was given to the owner to come and receive the goods, and it does not make out any right of the captain to land them, at the very instant of his arrival on the wharf. I think that the evidence was admissible. It did not seek to extend the liability of the ship-owner, but only to explain the meaning of the parties at the time of entering into the contract.

LORD BROUGHAM. — I do not doubt that the evidence
* 71 * was admissible to explain the meaning of the parties.

It did not go to extend the liability of the ship-owner. A party may properly in this way anticipate objections, and introduce evidence of this sort, which if he delayed to produce at that moment would afterwards be shut out.

Mr. Erle and Mr. Crompton, for the defendant in error. — So far as the case now stands, it appears that the defendants have brought error on a purely technical objection; an error in making up the judgment in the Court of Exchequer Chamber. There it was never once attempted to maintain the sixth plea; that plea was treated as off the record. An offer to pay the costs of the sixth plea was made and refused, and yet on account of that plea the defendants now attempt to subvert the whole of the proceedings. The plaintiff contends that the judgment is on the first count alone, and that no objection existing to that count, and the pleas to it being insufficient, the judgment ought to be affirmed. This is a

writ of error from a judgment of affirmance: it is an interlocutory judgment only; the writ of error shows that. — (He read it.) In such a case as this, the course of practice has been for the taxing-officer to ascertain on whose side the balance of the costs has been, and to tax accordingly. He has done so here, and only an aggregate sum is stated on the face of the record.

[LORD CAMPBELL. — Does the record from the Exchequer Chamber take no notice of the sixth plea?]

Nothing more than an interlocutory judgment ever does.

[LORD CAMPBELL. — There could be none but an interlocutory judgment on a demurrer.]

Suppose the Court had determined that the defendant should have costs, and he had had them, the record would have been the same then * as now. . * 72

[THE LORD CHANCELLOR. — Then you say that, as there is an aggregate sum for costs on the face of the record, we cannot ascertain in what way that sum was made up, and therefore cannot vary them.]

That is so. Unless this is a statutable judgment, it cannot be shown how the costs have been allowed. The Statute of Anne requires that the Court shall allow them. In the 3 & 4 Will. 4, c. 42, it is declared that the Court shall give judgment for the costs.

[THE LORD CHANCELLOR. — Then a judgment on demurrer says nothing about the costs; all mention of them is reserved till the final determination of the case. There is *unica taxatio*, and we cannot know how the different sums are disposed of. But what is the case where nothing is done by the party; where there are two issues, one of law and one of fact, and the party does not proceed with the issue of fact? Suppose, for instance, that each party should agree that the jury should

be discharged, but still there existed a judgment on demurrer, which had been decided in favour of the plaintiff, to whom would the costs be given ?]

To the plaintiff; if there were but one count and one issue. It has been decided that the plaintiff below, where there are more issues than one, is not entitled to judgment for him till the issue has been tried; *Burdon v. Flower*, (a) in which it was held that where a party gets judgment on a demurrer, and does not take down the issues of fact for trial, or does take them, but by consent a juror is withdrawn, he cannot obtain the costs of the demurrer.

[LORD CAMPBELL. — There is never a specific award of costs on a demurrer; there is a final award of costs.]

Then the argument on the other side is fatal to itself; for it shows that the Master gives a final balance, and the
 * 73 only award * of costs would be in favour of the party who is entitled to the balance. In a case of trespass, where a right of way was pleaded for the defendant, many witnesses would be necessary: if there was a verdict for the defendant on the justification, he would be entitled to judgment on the whole record. The award of costs would be for the plaintiff, after deducting the costs due to the defendant. The party might have asked the Court below to review the taxation; he ought not to come to this House for that purpose. This House can only look at the whole record, and will not receive an appeal for costs.

[LORD BROUGHAM. — That is so where granting or refusing costs is a question of discretion; but where there is a question of law affecting the costs, that is a ground of appeal. Where there is a *bonâ fide* cause of appeal, costs may be considered.]

But the House must, in such a case, have regard to the

(a) 7 Dowl. P. C. 786.

record. Here there is interlocutory judgment on three pleas; two to the first count, one to the second count; then there is an issue in fact, on which the jurors have found for the plaintiff, and the costs and charges on that issue upon the first count are assessed at 40s. A discharge of the jury is a compromise of the action; neither party can have costs there. Suppose there are only two counts in a declaration, and three pleas, two of fact and one of law; that the one of law is determined for the plaintiff, and the two of fact are tried, but the jurors are discharged, the defendant could not get a judgment for costs on that. The Court has a right to consider each count as a separate cause of action, and each plea as a separate defence. Till there is a final judgment on the second count, nothing can be done as to the costs. It cannot be said that the costs given here are given in respect of that *count; they were given as costs in the cause. *74 The plaintiff had received 5l.; the moment the judgment in the Exchequer Chamber was pronounced, 6l. were tendered back to the defendants. The record is much stronger than has yet been stated. The second count having been left undetermined, there were no damages in respect of that count. The judgment, therefore, on the record is, "considering that the plaintiff has a right to recover 40s. for his costs and charges, and also 734l. for his costs of increase." The verdict is confined to one count, the costs found by the jury are confined to that count, and the costs of increase are confined to the count found by the jury. So the matter stood in the Common Pleas. It was stronger in the Exchequer Chamber, for there the plaintiff's recovery of costs and charges was specially confined to the first count. The words of the judgment are these: "There was no error in the record or proceedings aforesaid, or in giving the judgment aforesaid, as to the said first count of the said declaration; therefore it was considered by the said Court of Exchequer Chamber there, that the judgment aforesaid, in form aforesaid given, as to the said first count, that the said plaintiff should recover against the said defendants his damages, costs, and charges, amounting in the whole to 1,516l., should be in all things affirmed. And it was further considered that the said plain-

tiff should recover against the said defendants, according to the form of the statute, &c., his damages, costs, and charges, which he hath sustained and expended by reason of the delay in the execution of the judgment aforesaid, as to the said first count, on account of the prosecution of the said writ of error: but because it further appeared to the said Court of Exchequer Chamber that the plea by the defendants lastly * 75 above pleaded, was sufficient * in law, as far as related to the said second count, and that the said defendants should go thereof without day." And this judgment was certified into the Common Pleas, that that Court might award such further proceedings as were necessary on that record. This judgment shows that the two counts were most carefully separated from each other, and that the award of double costs was not made in respect of a general judgment, which might have been given upon the bad as well as the good count, but in respect of the count which the Court of Exchequer Chamber at the time pronounced to be good and to be unanswered, and which has just been affirmed by this House. On such a judgment where there was an award of damages and costs, and the plaintiff was kept out of them by the defendants' writ of error, and had therefore a clear right to costs under the statute, for costs of increase must be taken with respect to damages assessed by the jury. *Frederick v. Lookup*, (a) *Eardley v. Turncock*. (b)

[LORD CAMPBELL. — Did the judgment of the Court of Common Pleas include the costs of the sixth plea? for if it did, there does not seem to have been any rectification of that error.]

The House cannot presume either way in this case. The termination of the judgment of the Exchequer Chamber shows that if the judgment on the sixth plea was a judgment as to costs, it was interlocutory, and error lies not upon an interlocutory judgment. *Samuel v. Judin*. (c) The judg-

(a) 4 Burr. 2018.

(b) Cro. Jac. 636.

(c) 6 East, 833.

ment of affirmance is that which is brought before this House, yet the judgment of reversal is erroneous, if the argument on the other side is right; for that argument is, that the Exchequer Chamber ought to award costs on * reversal. * 76 The judgment of the Court of Exchequer Chamber need not do that, for it contains a reference back to the Court of Common Pleas to do what was proper. It is impossible to alter the judgment. In a case of *Townsall v. King*, (a) there was a writ of error on one plea, leaving thirty-nine other pleas unanswered. There Mr. Baron PARKE called attention to the fact that the Court had no jurisdiction, as thirty-nine issues were left undetermined. It is the same here. If it had become matter of argument, it would have been clear that a cause of action was left undetermined on the second count.

[LORD CAMPBELL. — If the sixth plea was good, there was an end of the plaintiff's right of action under that plea; he was barred; there was no occasion to try an issue, for then there was a good plea to the whole declaration.]

That was the point argued in *Townsall v. King*, but the Court thought otherwise.

[LORD CAMPBELL. — If the jurors are discharged upon some of the counts, but find upon others, is not that a finding?

THE LORD CHANCELLOR. — Suppose the parties had gone down again after the Exchequer Chamber had decided the sixth plea to be good, to be a plea which was a complete answer to the claim of the plaintiffs: what would then be the use of a finding on the issue of fact on that plea?]

It would affect the costs.

[THE LORD CHANCELLOR. — What is stated on the record with respect to the issue in fact, on the second count?]

(a) Not reported.

That the jurors were discharged.

[LORD CAMPBELL. — The second count is put as containing a separate cause of action: there is a plea to the second count which has been held sufficient; why should not there be costs in respect of that?]

Because there are other pleas to that count.

* 77 [LORD CAMPBELL. — * Suppose there had been no other plea to the second count, and the Common Pleas had said that it was bad, and the Exchequer Chamber said it was good, how must the judgment be entered?]

If the judgment of the Common Pleas on that plea had been a final judgment, the Exchequer Chamber would have reversed it. If the judgment in the Exchequer Chamber, of reversal, was wrong upon this point, it is not now brought before this House; for in the assignment of errors there is no demand of costs upon the sixth plea. Indeed, so far, the defendants ask for that judgment to be affirmed. And in their reasons for this House affirming the judgment of the Exchequer Chamber, so far as it reverses the judgment of the Common Pleas, they only say that this House should do so, “because it appears that the defendants were bailees, not responsible for loss by accidental fire.” There is, therefore, no complaint before the House on the award of costs on the sixth plea.

[THE LORD CHANCELLOR. — But was it not the duty of the Exchequer Chamber to give judgment on that plea?]

Yes; on the prayer of the party, but not of its own accord. The state of the record shows that there could not be any decision till the issue in fact was determined. Thus, if there is one count to which there are three pleas, and the first is demurred to, and issue taken on the two others, and the demurrer is determined for the plaintiff, and the jurors are discharged as to the issues in fact, there can under such

circumstances be no judgment, for there is no final decision.

Now, as to the point whether the Court of Common Pleas was right as to the sixth plea: that plea was pleaded to the second count, which sets forth an absolute contract to deliver at Ironmonger Lane. The Court of Exchequer Chamber thought that it did not appear * on that count that * 78 the defendants were common carriers, and it therefore reversed the judgment of the Court of Common Pleas; but that opinion was erroneous. It is not necessary to state in terms that a party is a common carrier. Here the defendants were, beyond all doubt, shown to be common carriers till their arrival in the port of London; but if so, then, as the contract is entire, they were common carriers till the actual delivery of the goods. *Hyde v. The Trent and Mersey Company* (a) is decisive on that point. Abbott on Shipping (b) shows the right of the master to detain the goods for freight, and it speaks of his landing them at a wharf, with instructions to the wharfinger not to deliver them till the freight is paid, — a matter which shows the goods there to be still in his custody and possession; and the case of *Bishop v. Ware* (c) establishes that the master of a ship has no general right to detain the goods for wharfage: so that it appears clearly that if he lands them on a wharf for his own purposes, he must himself bear the charges thus incurred, and must consequently be treated as responsible for the goods while they remain on the wharf where he has placed them, in the same manner as if, instead of placing them there, he had kept them in his own ship. *Coats v. Chaplin* (d) confirms this view of the case.

[LORD CAMPBELL. — But under the second count, the contract to carry to Ironmonger Lane is an entirely new contract. The first contract had been satisfied so far as stated in that count, by bringing the goods to the wharf.]

It is but one contract, though there are two duties to

(a) 5 T. R. 389.

(b) 5 edit. 246; 6 edit. 331.

(c) 3 Camp. 360.

(d) 3 Q. B. 483.

be performed under it. *Garside v. The Trent Navigation*. (a) To make that * case applicable to such a count, it is not necessary to declare in terms against the defendants as common carriers. *Pozzi v. Shipton*. (b) That may be implied, and here it is expressly stated that they were owners of a ship used by them for the conveyance of goods, — a statement that is equivalent to declaring against the owner of a coach used for the conveyance of passengers, which in *Ansell v. Waterhouse* (c) was held sufficient. There is an absolute promise alleged in the second count, and the plea does not bring the defendants within the exceptions allowed by law to such a promise. Where the contract is absolute, the defendants must establish the exception, as, where it is exceptive, the plaintiff must allege it to be so, or it will be a variance. *Latham v. Rutley*. (d) The judgment of the Court below ought to be affirmed.

Mr. Kelly, in reply. — *Burdon v. Flower* (e) is not in point ; there was no final judgment in that case. Costs of a demurrer may be given to a plaintiff succeeding on it, though on the issue he may afterwards be nonsuited, or have a verdict against him. *Duberley v. Page*. (g) The costs are, therefore, not discretionary, but of right. The moment the Court of Exchequer Chamber determined that the defendants were entitled to judgment on the demurrer to the sixth plea, they became entitled to be relieved, not only against the erroneous judgment of the Common Pleas, but against the costs consequent thereon. The form of the assignment of errors cannot deprive the defendants of this right, for an assignment of errors is not required to be as technical and precise as a bill of exceptions.

June 11.

* 80 * THE LORD CHANCELLOR. — This interlocutory judgment on the demurrer is merged in the final judgment given in this case. Wherever there is a final judgment on the

(a) 4 T. R. 581.

(b) 8 Ad. & El. 963.

(c) 6 M. & Sel. 385.

(d) 2 B. & C. 20.

(e) 7 Dowl. P. C. 786.

(g) 2 T. R. 391.

whole record, that is the judgment to which we refer. The judgment we are asked to reverse is the judgment for the 700*l*. We have already expressed our opinion upon the first point in this case. We have, therefore, nothing to do now but to dispose of the last. There is a judgment after verdict in the Court of Common Pleas, and that judgment is reversed by a judgment in error in the Exchequer Chamber as to part. That shows that the plaintiffs were justified in bringing their writ of error ; and that, of course, frees them from the costs given on the writ of error, the 311*l*.

LORD CAMPBELL. — I am of the same opinion. I am bound to suppose that the Court of Error, the Court of Exchequer Chamber, thought the merits to be with the defendant in error as to the greater part of the subject of the writ of error. I am of opinion that the fourth plea is defective, and that there was nothing in the bill of exceptions. On the justice of the case, therefore, the merits were with the defendant in error ; but if the Court of Common Pleas was right in the decision on the sixth plea, it was bound to give the plaintiff the costs of the demurrer to that plea, when final judgment was pronounced. If it was the duty of the Court to do this, we must assume that the Judges of that Court did their duty. I believe that, in fact, they did so. The costs *de incremento* are only the additional costs that are to be given to the party entitled to final judgment, and we must assume that they were given to the plaintiff in the Common Pleas. But the judgment of that Court was partly reversed in the Court of Exchequer Chamber, when the sixth

*plea was held sufficient. I think that the Court of * 81 Exchequer Chamber was right in that : for the second count, to which that plea was pleaded, set forth a contract with the defendants, not as common carriers, but merely with them as bailees for hire and reward to do a particular act ; and with the exception of an accidental fire, for which in that character they were not liable, that plea shows that they were not guilty of negligence. The Exchequer Chamber rightly decided that the sixth plea was good : then it ought to have relieved the defendants from the costs with which, by the

judgment of the Common Pleas, they were charged in respect of that sixth plea. We are now in the situation in which the Court of Exchequer Chamber was when it gave that judgment; therefore, as far as the costs of that demurrer are concerned, we think that the defendants must be relieved from the payment of them. But it is said that they cannot now be relieved from paying the costs of the demurrer; because, when the prayer of the writ of error is looked at, they appear to make no complaint of the judgment of the Court of Exchequer Chamber, in respect of that Court not having awarded them the costs of that demurrer. Still I think the Exchequer Chamber ought to have done so; and then, are we not to correct that grievance unless it is pointed out by the assignment of error? for there is no assignment of error on that point. There is an assignment of error respecting the costs in the Exchequer Chamber itself; because it states, "that the sum of 811*l.*, by the Court of Exchequer Chamber," &c. (His Lordship read, from the assignment of error, down to the words, "therefore in that there is manifest error.") It is there-

fore pointed out to the House as manifest error, that the
 * 82 811*l.* costs were awarded; and I think it is * manifest error, because the Court of Exchequer Chamber having partly reversed the judgment of the Court of Common Pleas, the Judges of the Court of Exchequer Chamber had no power by law to give damages as against plaintiffs in error, whose assignment of error was held to be correct. So far, therefore, we must correct the judgment of the Court of Exchequer Chamber. In these two respects, — the costs with which the defendants were charged upon the demurrer to the sixth plea, and the costs with which they were charged by the Court of Exchequer Chamber for having brought the writ of error, though they had in part succeeded upon it, — so far, I think, we must correct the judgment that has been pronounced. As to all the rest, it will be affirmed. As to the form in which this is to be done, —

Mr. Kelly. — We will not trouble your Lordships with that. We understand the substance of your judgment to be, that some deduction is to be made by reason of the costs upon this

sixth plea: the plaintiff's costs, the sum *minus* that amount, will be paid, and then there will be no necessity for any further judgment at all.

LORD CAMPBELL. — For the sake of the regularity of our proceedings, there must be a judgment entered up; and if *Mr. Crompton* will suggest the form in which he thinks it ought to be, we will consider it.

THE LORD CHANCELLOR. — We must reverse the judgment of the Exchequer Chamber, so far as relates to the awarding of the sum of 811*l.* as damages and costs for the delay occasioned by the writ of error. The damages and costs awarded by the Court of Common Pleas must be reduced by the costs of the 6th plea, which are found at a certain sum, —

* *Mr. Crompton*. — At the sum of 5*l.*: the judgment * 83 will be affirmed in other respects.

THE LORD CHANCELLOR. — The more I consider it, the more I am satisfied that this sum comes within the description of costs *de incremento*. If the judgment of the Court below is a final judgment on the whole record, which I understand it to be (for I consider that a discharge of the jury on one count by consent, is an abandonment of all claim in respect of that count), then this is a writ of error on a final judgment on the whole record. The jury would have assessed these damages if they could; but they could not do it. The officer of the Court must look at the whole record, and settle the costs which the plaintiff is entitled to in consequence of having judgment in his favour.

LORD CAMPBELL. — If *Mr. Smith* and *Mr. Crompton* will first hand in minutes to carry into effect what the Lord Chancellor has propounded, that will be sufficient for the officers to draw up the judgment. There is no necessity for doing it immediately.

Mr. Crompton. — Your Lordship has not said any thing as

to the costs in the House, which are quite in your discretion.

LORD CAMPBELL. — No costs.

[An order to the following effect was afterwards entered on the Journals: It began by reciting that a writ of error had been brought “to reverse a judgment given in the said Court of Common Pleas for the defendant in error, and also a judgment of the Court of Exchequer Chamber affirming the
 * 84 * said judgment of the Court of Common Pleas, except as to the sixth plea pleaded to the second count in the declaration, which was considered by the said Court of Exchequer Chamber to be good and sufficient in law to bar the said defendant in error from maintaining his action;” and it then proceeded as follows: “It is ordered and adjudged, that so much of the judgment of the Court of Common Pleas as awards 734*l.* to the said Samuel Gatliff (defendant in error), for his costs and charges adjudged of increase to the said Samuel Gatliff, and also the judgment of the said Court of Exchequer Chamber in so far as it affirms the said part of the said judgment of the Court of Common Pleas, be and the same are hereby reversed. And it is further ordered, that the said Samuel Gatliff do recover against the said defendants (plaintiffs in error) his damages and costs by the jury aforesaid, in form aforesaid, assessed, together with 729*l.* for his costs and charges of increase in the said Court of Common Pleas, about his suit in respect of the first count of his declaration; making the said plaintiff’s costs and charges in the whole 1511*l.* And it is further ordered and adjudged, that so much of the said judgment of the Court of Exchequer Chamber as adjudges 311*l.* to the said Samuel Gatliff for his damages, costs, and charges sustained by reason of the delay in the execution of the judgment of the Court of Common Pleas, be and the same is hereby reversed. And it is further ordered and adjudged, that in all other respects the said judgment be affirmed.” — *Lords’ Journals*, 11th June, 1844.]

* IN COMMITTEE FOR PRIVILEGES.

* 85

1844.

THE SUSSEX PEERAGE.

Royal Marriage Act. Evidence. Practice. Construction of Statutes.

The Royal Marriage Act, 12 Geo. 3, c. 11, extends to prohibit the contracting of marriages, or to annul any already contracted, in violation of its provisions, wherever the same may be contracted or solemnized, either within the realm of England or without.¹

In a claim of peerage, where the question was, whether the deceased peer, the father of the claimant, had been married or not, a Prayer-book, found after the death of the claimant's mother among her papers, was received, and an entry made in her handwriting, declaring the fact of the marriage, read from it, not as conclusively proving that fact, but as a declaration of it made by one of the parties at the time. (*Infra*, p. 98.)

A will of the deceased peer, made many years before his death, declaring, and in the most solemn form, his marriage, and the legitimacy of his son (the claimant of the peerage), was proposed to be read as a declaration made by one of the parties ; but it was rejected, because the date, and certain expressions in it, showed it to have been written after a suit to annul a marriage of the deceased peer had been instituted by his father, and because there was nothing to show that that marriage was not the very marriage in question. (*Infra*, pp. 99-103.)

The declarations of a deceased clergyman to his son, to the effect that he had celebrated a marriage between the deceased peer and his alleged wife, are not receivable in evidence as the declarations of a deceased party made against his own interest ; such interest not being an interest of a pecuniary nature.²

The law does not recognize the apprehension of possible danger of a prosecution as creating an interest which can bring these declarations within the rule in favour of their admissibility in evidence upon the

¹ See *Brook v. Brook*, 9 H. L. Cas. 198; *Medway v. Needham*, 16 Mass. 157; *Sutton v. Warren*, 10 Met. 451.

² See *Smith v. Blakey*, L. R. 2 Q. B. 326; *Padwick v. Wittcomb*, 4 H. L. Cas. 425.

ground of their being declarations made against the interest of the party making them. (*Infra*, p. 103 *et seq.*)

A professional or official witness, giving evidence as to foreign law, may refer to foreign law books to refresh his memory, or to correct or confirm his opinion; but the law itself must be taken from his evidence.*

A Roman Catholic bishop holding the office of coadjutor to a vicar-apostolic in this country, is, in virtue of that office, to be considered as a person skilled in the matrimonial law of Rome, and therefore admissible as a witness to prove that law.

In a claim of peerage, where evidence has been produced for the purpose of establishing a certain point, the party who has produced it will not, should the Crown call evidence of a contradictory kind,

* 86 * be allowed to produce additional evidence confirmatory of the first.

Before the claimant's junior counsel summed up the evidence previously to the opening of the case on the part of the Crown, the counsel for the Crown were required by the committee to declare whether they would or would not call evidence on a question of foreign law, so as to enable the claimant's counsel to determine whether they would then (as they could not afterwards) produce any additional evidence on that question.

By the Judges. — The rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are of themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The

* See *Yates v. Thompson*, 3 Cl. & Fin. 545 and note (2), and cases cited; *Di Sora v. Phillipps*, 10 H. L. Cas. 624; 1 Dan. Ch. Pr. (4th Am. ed.) 95, 864, and note (2); *Campion v. Kille*, 1 McCarter (N. J.), 229; *M'Cormick v. Garnett*, 5 De G., M. & G. 278; *Kline v. Baker*, 99 Mass. 253. English Courts may now ascertain what the foreign law is by sending cases for the opinion of foreign Courts; but, unless they are in countries under the government of the Queen, a convention must first be entered into with the foreign government. 22 & 23 Vict. c. 63; 24 & 25 Vict. c. 11; 1 Dan. Ch. Pr. (4th Am. ed.) 864, note (2); 2 *ib.* 1142-1145. In Massachusetts, the unwritten or common law of any other of the United States, or of the territories thereof, may be proved as facts by parol evidence; and the books of reports of cases adjudged in their Courts may also be admitted as evidence of such law. Gen. Stats. c. 132, § 64. The existence, tenor, or effect of all foreign laws, may be proved as facts by parol evidence; but if it appears that the law in question is contained in a written statute or code, the Court may in its discretion reject any evidence of such law that is not accompanied by a copy thereof. —*ib.* § 65.

words themselves do, in such case, best declare the intention of the legislature.⁴

May 23; June 18, 25, and 28; July 9, 1844.

Soon after the death of his Royal Highness the Duke of Sussex, in the year 1843, a petition was presented to her Majesty by Augustus Frederick D'Este, claiming the honours, dignities, and privileges of Duke of Sussex, Earl of Inverness, and Baron of Arklow.

This petition, stating the grounds (*a*) upon which the claim rested, was referred by her Majesty to the Attorney-General to consider and report thereon. Evidence in support of the claim was laid before the Attorney-General. The facts, as they appeared from the petitioner's printed case, were these: His late Royal Highness, Prince Augustus Frederick, was the sixth son of his late Majesty George 3; in 1793 he went to Rome, and on the 4th of April in that year intermarried with Lady Augusta Murray, the second daughter of the Earl and Countess of Dunmore; that marriage was celebrated by a clergyman of the Church of England, in a form as nearly as could be according to the rites of the Church of England, an English Prayer-book being used upon the occasion; and it was contracted and attested by two papers * signed by his Royal Highness and by * 87 Lady Augusta, which papers were in the following terms:—

“As this paper is to contain the mutual promise of marriage between Augustus Frederick and Augusta Murray, our mutual names must be put here by us both, and kept in my possession; it is a promise neither of us can break, and is made before God our Creator and all-merciful Father.”

“On my knees before God our Creator, I, Augustus Frederick, promise thee, Augusta Murray, and swear upon the Bible, as I hope for salvation in the world to come, that I will

(*a*) See Lords' Jour. for 22d August, 1843.

⁴ See 1 Kent (11th ed.), 461, 752; *Doughty v. The Somerville & Eastern R.R. Co.*, 1 Zabriskie, 442, 445, 446; *Dwarris on Sts.* 708.

take thee Augusta Murray for my wife ; for better for worse ; for richer for poorer ; in sickness and in health ; to love and to cherish till death us do part ; to love but thee only, and none other ; and may God forget me if I ever forget thee. The Lord's name be praised ! So bless me ! So bless us, O God ! And with my handwriting do I Augustus Frederick this sign, March the 21st, 1793, at Rome ; and put my seal to it, and my name.

(L. S.)

“ AUGUSTUS FREDERICK.

“ (Completed at Rome, April 4th, 1793.)”

“ On my knees before God my Creator, I Augusta Murray promise and swear upon the Bible, as I hope for salvation in the world to come, to take thee Augustus Frederick for my husband ; for better for worse ; for richer for poorer ; in sickness and in health ; to love and to cherish till death us do part. So bless my God, and sign this.

“ AUGUSTA MURRAY.”

There were duplicates of these papers ; and in the first * 88 of them, the words “ Married, April 4th, 1793, * Rome, 7 o'clock at night,” were introduced in the place of the words “ Completed at Rome, April 4th, 1793.” The latter words were added on the day thus mentioned, in the handwriting of his Royal Highness.

The petitioner's case further stated that the parties were again regularly married in England, and that the petitioner was born in the parish of St. Marylebone, in the county of Middlesex, on the 13th January, 1794 ; and the petitioner was the only male issue of the marriage : that by letters-patent, dated on the 27th November, 1801, his Royal Highness, Prince Augustus Frederick, was created a peer of the realm, by the titles of Baron Arklow, Earl of Inverness, and Duke of Sussex, with limitation to the heirs male of his body ; and that his Royal Highness afterwards sat and voted in Parliament, and died on the 21st April, 1843, leaving the petitioner his only son and heir male him surviving.

The Attorney-General, on the 21st August, 1843, made a report to her Majesty, in which he said, “ It appears to me,

on the testimony laid before me, that it is established that the contracts of marriage above set forth were entered into by his late Royal Highness the Duke of Sussex and the Lady Augusta Murray, at Rome, on the 21st of March, 1793; and I think it may be inferred that his late Royal Highness the Duke of Sussex and the Lady Augusta Murray considered that they stood in the relation of husband and wife." He then expressed his doubts of the fact of any marriage, valid by the laws of England, having been contracted, even independently of the Royal Marriage Act (12 Geo. 3, c. 11); and declared that he was not satisfied with the correctness of certain opinions which were laid before him, stating that Act to have no binding force on parties living out of England. He * therefore recommended her Majesty to * 89 refer the petition to the House of Lords. Her Majesty was pleased to adopt this recommendation; and on the 22d of August the petition, together with the Attorney-General's report, was referred to the House of Lords, and by the House to the Lords committees for privileges.

At the first sitting of the committee for privileges, on the 7th of June, 1844, the Earl of Shaftesbury in the chair, the Lord Chancellor, Lord BROUGHAM, Lord DENMAN, Lord COTTENHAM, Lord LANGDALE, Lord CAMPBELL, and other Lords being present; and Lord Chief Justice TINDAL, Lord Chief Baron POLLOCK, and Justices PATTESON, WILLIAMS, COLTMAN, and CRESSWELL, and Baron PARKE, attending;—

Sir T. Wilde (*Mr. Earle* and *Mr. James Wilde* were with him) opened the case for the petitioner. There will be no difficulty in this case in proving the petitioner to be the only son of the late Duke of Sussex. The fact of the marriage will also be easily established, and the only question will be as to the validity of that marriage. The marriage was a valid marriage by the laws of England, independently of the Royal Marriage Act. And it is submitted that that Act does not impeach its validity. The correspondence between the parties, both before and after the marriage (many parts of which were put in and read), proves beyond doubt that the object they had in view was marriage, and nothing else.

The prince appeared to imagine that if married at Rome, he should, especially after he was twenty-one, be able, notwithstanding any opposition, to have his marriage celebrated in England. It appeared that Protestants at Rome had considerable difficulty in celebrating marriages between themselves. The Roman priests could not celebrate such marriages, and the laws of Rome did not recognize any * 90 marriage, except those * which were celebrated according to the Roman Catholic ritual. In this situation of things, the prince had recourse to the Rev. Mr. Gunn, an ordained minister of the Church of England, who happened to be at the time in Rome for the purpose of discovering and collecting the Stuart papers. After long-repeated importunities, Mr. Gunn consented to celebrate the marriage; and the fact would be placed beyond all doubt that he did celebrate it according to the rubric of the Church of England, with every form that circumstances enabled him to employ, in order to give it force and validity. This marriage is, therefore, a valid marriage by the laws of England, as a foreign marriage made at a place where no other form of marriage was open to the parties. Or, if denied to be a marriage valid, according to the laws of England, as strictly a marriage celebrated according to the General Marriage Act, then it is valid as a contract of present relation of husband and wife, and may be considered as if made between two parties in a desert island in the ocean, where no laws existed, and where the solemn and declared intentions of the parties must, from the necessity of the case, constitute the marriage; or as made at a place where only one form of marriage was open to the parties, and they married by that form; in which case their marriage would undoubtedly be good according to the laws of England.

The question upon the statute then arises: assuming the marriage to be perfectly valid and unobjectionable by English or Roman law, the question arises whether it is avoided by reason of the Act of Parliament commonly known as the Royal Marriage Act, one of the parties to the marriage being a descendant of Geo. 2? In order to try the effect of that circumstance, and the construction of the Act of Par-

liament, the marriage must be assumed to be valid in
 * other respects. The material clause in that Act is in * 91
 these terms:—

“ That no descendant of the body of his late Majesty King George the 2d, male or female (other than the issue of princesses who have married or may hereafter marry into foreign families), shall be capable of contracting matrimony, without the previous consent of his Majesty, his heirs or successors, signified under the Great Seal, and declared in Council (which consent, to preserve the memory thereof, is hereby directed to be set out in the license and register of marriage, and to be entered in the books of the Privy Council); and that every marriage or matrimonial contract of any such descendant, without such consent first had and obtained, shall be null and void to all intents and purposes whatsoever.”

Is this Act confined to marriages contracted in England, or in British territories, or does it affect to enact prohibitions on British subjects marrying anywhere and under any forms of law? It cannot have this latter operation. Its obligations and prohibitions must be confined to marriages contracted within British territories. There are two cases on this subject, one of which is directly in point: *Swift v. Swift* (a) is a case where the parties were married in Rome. There, both parties were British subjects and Protestants, and by the law of Rome no Protestant religious ceremony could be celebrated between them. The marriage was, therefore, not made according to the English law. Nor by our law would it have been good in another view of the matter; for in order to get married they had fraudulently pretended to be Roman Catholics, and had made profession of that faith, and had been married according to the form of * the Roman * 92 ritual. The Arches Court, on the ground of the fraud, had declared the marriage invalid; (b) but the Privy Council reversed that decision, as neither party had been deceived as to the person with whom the contract was made, and as the marriage had been good by the forms of the Roman law.

(a) 3 Knapp, 257.

(b) 3 Knapp, 303.

The next case is that of Lord Cloncurry. (a) There a divorce bill was introduced into the legislature, and it became necessary to ascertain whether there had been a valid marriage. Both the parties there were Protestants. They had been at Rome ; and not being able, as Protestants, to have the marriage ceremony performed according to the law of the place, they were married by an English priest, as the parties have been in the present instance. When the bill was argued at the bar of this House, Lord ELDON desired to know what was the law at Rome as to the marriages of Protestants. Witnesses were examined, and it was proved that by the law of Rome, and the effect of the Council of Trent, Protestants could not be married at Rome ; it was also proved that these parties had been married *per verba de præsenti*, in the presence of an English clergyman, and this House held the marriage to be valid. These two cases are decisive of the present.

[LORD BROUGHAM. — Lord Cloncurry's case does not much affect the matter ; for that was a divorce bill, where but slender proof of marriage is required, as the marriage is set up merely to be knocked down again.]

Suppose that the husband there had been a descendant of Geo. 2, that would not have rendered the marriage invalid ; the Royal Marriage Act creates no incapacity.

The General Marriage Act has always been treated by * 98 the Courts as one creating disabilities and as * restricting the exercise of natural rights, and therefore requiring to be strictly construed. That objection applies with infinitely greater force to the Royal Marriage Act. The first objection to the Act arises on its vague and indefinite character. It affects to apply to the descendants of Geo. 2. Does it apply to them for a restricted and limited period only, or for ever ? If the latter, how many persons are subject to its operation ? And are they subject to it from their birth, or do they become so only under particular circumstances, and

(a) Cruise on Dignities, cvi. § 85, p. 276 (ed. 1823). The name of the case is not mentioned.

at particular periods of their lives? Are all the remote descendants of Geo. 2, who and whose parents may have lived abroad, away from the operation of the laws of this country, and perhaps ignorant of their existence, are they all to be subjected to the provisions of this Act, and to be incapable of marrying except with the consent of the Sovereign of this country? No one can pretend that an English statute can have such a universal effect. A statute creating an incapacity must, according to the rules of English law, apply to some definite time, or place, or person. This statute, though creating an incapacity, does nothing of the sort. To give effect to such a statute, all the ordinary rules of construction must be abandoned, and a course adopted hitherto unknown to the law; intention must be guessed at, and the general rules of the law violated, in order to enforce it. The Act itself excepts from its operation the issue of princesses who have been married, or who may marry, into foreign families. This shows that it was intended to have a very restricted operation, and not to apply to all those who, by the chances of events, might come to have a claim to the succession to the Crown. If the Act really had any distinctive purpose of policy, here is an abandonment

* of it. The persons nearest the succession to the Crown * 94 have been those expressly excepted from its provisions.

The Princess Charlotte was a princess who married into a foreign family. By the terms of the Act, her issue would be excepted from its provisions; yet she was very near the throne; and her case, therefore, affords a proof of the extraordinary inaccuracy and looseness with which the Act was drawn, and shows it rather to have been an emanation of the royal temper at the moment than a well-considered and well-framed piece of State legislation. The issue of her present Majesty, had she married while a princess, would, in like manner, have been exempt from its operation. Again, some of the provisions of the Act are incapable of execution in foreign countries. The Act requires the consent of the Sovereign signified under the Great Seal, but provides no form in which it shall be asked; limits no time within which the answer shall be given; nor affords any means by which

the answer, if a negative, shall be known. While defective in all these respects, it goes on to provide in the second section, that if the answer should be in the negative, the party applying for the consent may give notice to the Privy Council ; yet it secures no means for showing that any answer in the negative has been given, though it makes the existence of such an answer a condition precedent to the giving notice to the Privy Council ; nor does it enact that the lapse of a certain time without any answer being made to the demand shall be treated and considered as a dissent on the part of the Crown.

The Act is open to still further objections : besides creating an incapacity (supposing it to do so), it creates a crime. The

parties offending against it are subjected to forfeiture of
 • 95 property and to imprisonment. * What, then, must be

the rules of construction applied to such an Act ? It cannot be denied that the British Parliament possesses the power to impose restrictions and disabilities and incapacities on any British subject, which shall operate on him anywhere ; but then the intention to do so must be clearly, plainly, and unequivocally expressed in the Act which proposes to effect such a purpose, and the Act must be so framed as to render its provisions capable of being fully carried into effect. Neither of these things can be said to be true of this Act. This rule has been applied from the earliest times to the crime of murder, and to other offences committed by British subjects beyond seas ; in all of which the forms of proceeding, the extent of jurisdiction, and the means of exercising it, have been fully provided for. In all of these Acts too, the legislature has expressly described the offence, for the punishment of which provision was thus specially made, as an offence committed “ beyond the seas.” Even treason, if committed abroad, can only be tried in this country under the provisions of a special statute. Is the Royal Marriage Act to receive a wider and less limited operation than the law of treason ? The legislature might have expressed such to be its intention ; but it has not done so. The form of prohibition here is no higher than that which exists in many cases of civil contract ; and if so, where is the instance to

show that the provisions of any general enactment shall operate out of the British territory? This Act cannot be construed differently from others of the same class and kind. The words of the Act seem to contemplate only such marriages as took place within the British territory. The details, such as they are, show this. How is the consent to be indicated? Under the Great Seal, — not, as before, * under the Privy Seal, but under the Great Seal, and * 96 declared in Council; and in order to preserve the memory thereof, the consent thus signified is to be set out in the license and register of marriage. What license and register? No such things exist abroad, and all these provisions are, therefore, inapplicable to the cases of foreign marriages. It may be said that these matters are merely directory and not essential; but they are important as showing what was the object of the legislature, and how it was to be accomplished; and they show an object which could only be accomplished within the realm of England. It therefore follows that the provisions of the Act are only applicable to cases within the realm of England. From first to last the enacting provisions of the first clause are confined to English marriages; yet it cannot be said that that clause overlooks foreign marriages, for it deals with them by expressly excepting them from its provisions. In every respect, therefore, by the ordinary rules of construction applicable to statutes, it may be contended that the legislature did not intend that the Act should have any operation out of England.

If these rules of construction are applied, as they ought to be, to this statute, it cannot be pretended that any man would, by being present at or assisting in celebrating such marriage abroad, subject himself to the pains and penalties of the statute. Would it be possible to frame an indictment to meet such a case? It would not. The parties could not be tried out of the British territory. The jurisdiction, like the offence, must be local, — a circumstance of great importance in considering the construction of the Act.

How would this law stand with regard to Ireland?

* Ireland, at the time when it was passed, was not * 97

made by English Acts of Parliament. Suppose the marriage to be valid in Ireland, would it be valid everywhere ~~and~~ except here? What is the great principle of all laws on the subject of marriage? it is that a marriage good at the place where it is contracted, shall be good everywhere. The principle of this rule is so excellent in itself, and is so universally admitted, that it is applied in other cases besides those of marriage. A contract which, for want of being executed with certain forms in England, would be absolutely void here, will, if made elsewhere, according to the law of the place where it is made, be valid though executed without any of those forms, and be enforced here. The marriage here was good at Rome; and being so, to say that it is bad here would be a departure from a universal rule of law, and that too upon an implication only, and not on an express declared authority. The argument of analogy, derived from other statutes, is fatal to the application of this statute to cases of marriages celebrated abroad. The General Marriage Act affords in that way an argument against this Act being of any force in a foreign country. The General Marriage Act declares that its provisions shall not extend to marriages beyond seas. That means the English colonies, nothing more.

[LORD BROUGHAM. — It does not even include Scotland.]

Again, the 15 Geo. 2, c. 40, declares that if any person is lunatic, that person shall not marry until the Lord Chancellor has declared that such person has recovered his sanity. Does that Act operate on British subjects out of England? It does not, and yet it is an instance of an Act of general legislation for most wise and beneficial purposes, and is wholly unrestricted by its terms. The words “not * 98 capable” will, perhaps, * be said to be of greater force than the phrase “shall not marry.” The argument is deserving of little consideration except in cases where the general intention is clear, but where a particular expression might introduce a doubt into the matter. Again, what has been the course with Acts of Parliament relating to other

matters done abroad? They have been held of no effect unless the Acts expressly included cases occurring abroad. The 11 Geo. 4, and 1 Will. 4, c. 65, § 34, declares that if any person found lunatic abroad has funds in this country, such funds shall be transferred to any foreign committee; and in order to make that declaration effective, the legislature passed another section, the 36th, which provided that the powers given to the Lord Chancellor should be capable of being exercised as to all land and stock within any of the dominions, plantations, and colonies belonging to his Majesty. By the Statute 5 Geo. 4, c. 112, relating to the slave trade, where the most strict terms of prohibition were employed against the doing of certain acts, the question arose, whether acts of the kind prohibited, done out of the limits of British territory, could be made the subject of punishment upon the individual who had done them: and punishment in such a case being found impossible, the legislature was compelled to pass a statute (the 6 & 7 Vict. c. 98), declaring that the acts forbidden to be done should, if done by any British subjects, wheresoever residing, be punishable under the former statute. That statute is a distinct legislative declaration in favour of the argument now submitted to the consideration of the House.

[The learned counsel then proceeded to argue that the marriage in this case was valid in Rome, and therefore must (independently of the Royal Marriage Act) be treated as valid in this country; and cited *Lord Cloncurry's* * *Case*, (a) *Pointer on Marriage*, (b) *Story's Conflict of* * 99 *Laws*, (c) *Warrender v. Warrender*, (d) *Lindo v. Belisario*, (e) *Ruding v. Smith*, (g) *Latour v. Teasdale*. (h) These arguments are not reported, as the question put to the Judges assumed a marriage in fact, and also assumed the validity of that marriage so far as the Royal Marriage Act was not con-

(a) *Cruise on Dignities*, 276.

(b) Page 290.

(c) Ch. v. § 118.

(d) *Ante*, Vol. II., p. 531.

(e) 1 Hagg. Cons. Rep. 216.

(g) 2 Hagg. Cons. Rep. 371.

(h) 8 Taunt. 830.

cerned, and made the claimant's title depend entirely on the construction to be put upon that Act.]

In the course of the evidence of the marriage, a Prayer-book, produced from the papers and documents of Lady Augusta, and containing an entry proved to be in her handwriting, was tendered in evidence. The entry was as follows: "The Prayer-book by which I was married at Rome to Prince Augustus Frederick, on the 4th day of April, 1793, by the Rev. Mr. —." The entry itself was without date.

Mr. Waddington, who was with the Attorney-General and Solicitor-General on behalf of the Crown, objected that the entry in this Prayer-book was not admissible for the purpose of proving the fact to which it related.

THE LORD CHANCELLOR. — It is admissible as a declaration by one of the parties that there was a marriage, though not admissible to prove the marriage.

The Prayer-book was received, and the entry read.

A will dated Berlin, 15th September, 1799, and proved to be in the handwriting of the prince, and sealed with
*100 the royal arms, was tendered in evidence, *as a declaration made by him at the time: it was not the will under which his executors acted.

Mr. Waddington. — This paper cannot be received in evidence, even as a declaration by the party; for it appears by the date to have been made after a suit was instituted to annul the prince's marriage. It contains a statement of that suit, and therefore, by the decision in the *Banbury Peerage Case*, it is inadmissible.

Sir T. Wilde. — There never was any *lis* as to the fact of the marriage; and this declaration, which only states that

fact, is therefore evidence. The *lis* only related to the legality of the marriage.

Mr. Waddington. — The paper says, “ Notwithstanding a decree has passed Doctors’ Commons to declare my marriage unlawful and void, yet I still feel myself bound ; ” and then goes on to state that the writer makes the declaration contained in it for the purpose of establishing the legitimacy of his son, which had been called in question by these proceedings. This clearly falls within the ordinary rule of law against admitting declarations *post litem motam*.

Sir T. Wilde. — This paper is offered in proof only as a declaration of the fact of the marriage. That fact never has been questioned ; the passage now read from the paper proves that. The decree never could have been passed to declare a marriage unlawful and void, if no marriage had in fact taken place. The dispute there was on the legal consequences of the marriage, which is quite a collateral matter.

LORD BROUGHAM. — Suppose, in a jactitation suit, the question to be, marriage or no marriage ; could not those parties, one or both of them, set up this * very marriage at Rome to prove the affirmative of that question ? * 101
If so, would not this suit, taking it to relate to the marriage at Rome, constitute a *lis mota* ?

THE LORD CHANCELLOR. — Does that suit relate to any thing but the marriage in England ? Do you mean to produce the decree thus referred to ?

Sir T. Wilde. — I do not.

THE LORD CHANCELLOR. — Then, for any thing that appears to the contrary, it may relate to the marriage at Rome.

Sir T. Wilde. — Even if it does so, it cannot relate to the marriage in fact, but to the question whether that marriage was operative in law.

Mr. Waddington. — The suit in which this decree was made, was a suit for nullity of marriage, instituted at the instance of the King.

LORD CAMPBELL. — That shows that there was a suit in which a marriage was in question. The natural inference is that this very marriage was the marriage in controversy. Then this declaration is one made after a sentence of the Ecclesiastical Court, and the sentence may have proceeded on the ground that there was no marriage at Rome.

LORD BROUGHAM. — The document shows that there has been a *lis*; and my opinion is, that that makes it impossible for us to receive this document till we see what that *lis* really was. The argument that the decree only related to the lawfulness of the marriage, and not to the fact of a marriage, cannot be sustained, for the alleged marriage might have been only a pretended marriage.

* 102 * THE LORD CHANCELLOR. — The form of the judgment is, “the marriage or pretended marriage.” At the present moment this document cannot be admitted as evidence without further explanation.

LORD CAMPBELL. — It would be contrary to express decisions to admit this document. We know that there was a decree respecting the validity of a marriage: this is a declaration after that decree. *Esto*, that this particular marriage was not in controversy. Our receiving this declaration after such a decree would only be giving an opportunity, one marriage having failed, to set up another. All the facts now relied on might have been in evidence in that suit.

LORD DENMAN. — I have got the report of the case in 2 Addams. The libel states that on the 4th of April a “marriage, or rather a show or effigy of marriage, between his said Royal Highness Prince Augustus Frederick and the said Lady Augusta Murray, was in fact had and solemnized, or pretended to have been had and solemnized, at the house of

the said Right Honourable Charlotte, Countess of Dunmore, at the said city of Rome, on the 4th day of April, 1793."

THE LORD CHANCELLOR. — A declaration of a marriage is only admissible in evidence as a declaration of a legal marriage. The legality of it had been in controversy here. The declaration of a marriage in fact is nothing.

LORD BROUGHAM. — The judgment is to this effect: "In respect to the fact of marriage, or rather show or effigy of a marriage, pleaded in the said libel to have been had and solemnized, or pretended to have been had and solemnized, at the house of the Right Honourable Charlotte, Countess of Dunmore, in the * city of Rome, on the 4th day of * 103 April, 1793, there is not sufficient proof by witnesses that any such fact of marriage, or rather show or effigy of a marriage, was in any manner had or solemnized at the said city of Rome, between his said Royal Highness Prince Augustus Frederick and the Right Honourable Lady Augusta Murray, spinster, the parties cited in this cause; but that if any such marriage, or rather show or effigy of a marriage, was in fact had or solemnized at the said city of Rome between the said parties, the said pretended marriage was and is absolutely null and void to all intents and purposes in law whatsoever."

This judgment distinctly declares, that there is not sufficient to prove the fact of the marriage, but that, if it existed in fact, it was null and void. This surely shows that the Roman marriage was in issue.

LORD CAMPBELL. — So that the declaration in the will would be in contradiction to the judgment of a Court. It cannot be received.

Another will of a subsequent date was also tendered, but it was objected to on the same ground, and both the wills were rejected.

Dr. Lushington was afterwards called to state in what man-

ner his Royal Highness had uniformly spoken of the claimant in conversation ; but this evidence was rejected on the same ground.

The declarations of Mr. Gunn, made to his son, with respect to the marriage, were proposed to be proved in evidence by his son, on the ground that they were the declarations of an individual who knew the facts, who was not interested in misrepresenting them, who had an interest in being silent respecting them, and whose statements, he being dead, were therefore admissible in evidence.

* 104 * *Sir T. Wilde* and *Mr. Erle*, in support of the evidence tendered. — Mr. Gunn has been proved to have been at Rome at the period in question. By the letters of the Prince and of Lady Augusta it is proved that they proposed to be married, and were married by a Mr. Gunn, who is shown to be the person whose declarations are now tendered to the committee. He had a perfect knowledge of the facts, and was not interested in misrepresenting them, but the contrary. The question to which these declarations relate rests partly on an Act of Parliament, which contains a penal clause. There have been proceedings in Chancery ; Mr. Gunn was called as a witness, and interrogatories were put to him ; he demurred to them on the ground that if he answered them he might subject himself to penalties under the 12 Geo. 3, c. 11. This shows that he not only was not interested in misrepresenting facts to support the marriage, but believed himself to have an interest the other way. In *Higham v. Ridgway*, (a) where the question of the date of a birth arose, a paper was offered in evidence which purported to contain an entry of a charge of attendance on the mother, and at the bottom of the charge was written a statement that it had been paid. The entry was offered in evidence for proof not only of the fact of the birth, but of the time at which it took place : and it was received in evidence upon two grounds, either of which would have been sufficient. The first was, that it was the entry of an act of which the

(a) 10 East, 109.

man making it had perfect knowledge, and which he had no interest to misrepresent. Further than this, the book contained an entry of payment, which was against the interest of him who made it, showing that the charge which he * had made for attendance had been discharged. The * 105 necessity of the case renders such evidence admissible.

Mr. Justice LE BLANC, in considering the question, said : (a) “ On inquiring into the truth of facts which happened a long time ago, the Courts have varied from the strict rules of evidence applicable to facts of the same description happening in modern times, because of the difficulty or impossibility, by lapse of time, of proving those facts in the ordinary way by living witnesses. On that principle stands the evidence, in cases of pedigree, of declarations of members of the family who are dead, or of monumental inscriptions, or of entries made by them in family Bibles. The like evidence has been admitted in other cases where the Court was satisfied that the person whose written entry or hearsay was offered in evidence had no interest in falsifying the fact, but on the contrary had an interest against his declaration or written entry. Here the entries were made by a person who so far from having any interest to make them, had an interest the other way ; and such entries against the interest of the parties making them are clearly evidence of the fact stated, on the authority of *Warren v. Greenville*, (b) and of all those cases where the books of receivers have been admitted.” And Mr. Justice BAYLEY, adopting the same line of argument, said : “ The principle to be drawn from all the cases is, that if a person has peculiar means of knowing a fact, and makes a declaration of that fact, which is against his interest, it is clearly evidence after his death, if he could have been examined to it in his lifetime.” Attention was called in *Gleadow v. Atkins* (c) to this last expression of Mr. Justice BAYLEY, and that * learned Judge, who had then taken his seat in the * 106 Court of Exchequer, disavowed the opinion as to restricting the production of the entries by the circumstance

(a) 10 East, 112.

(b) 2 Str. 1129.

(c) 1 Cr. & M. 410.

of the writer of them, if alive, being capable of being examined. In other respects he adhered to his original opinion. These authorities show that there is no necessity that the entry should be made in the discharge of a duty, nor that he should be able to be examined in his lifetime. *Standen v. Standen* (a) is a strong authority to the same effect. There a declaration by a clergyman, made to the supposed husband, that a friend of the wife's had forbid the banns the second time they were published, was held admissible, not as proof of the fact, but as evidence that the clergyman had married the parties without the due publication of banns. That declaration could only have been admissible on the ground that it was a declaration against the interest of the party who made it. Mr Justice BAYLEY distinctly states (b) that peculiar knowledge, and no interest to misrepresent, will render declarations admissible in evidence after the death of the parties who make them; and that was the abstract he had made of the case of *Roe d. Brune v. Rawlings*. (c) It is true that in *Higham v. Ridgway* the parties had the benefit of contending not that the entry which was sought to be read was against the interest of the party making it, but that what he then wrote became admissible by the subsequent entry, which was in opposition to his own interest. It may now be considered to be the rule, that the fact of the entry being against the party's interest will make it admissible. In the present case it is surmised that Mr. Gunn committed an unlawful act in celebrating the marriage in question.

* 107 * It would, therefore, have been against his interest to admit that he had been a party to an illegal transaction, and in consequence of that belief he refused to give his evidence in Chancery.

[THE LORD CHANCELLOR. — But in the *Berkeley Peerage Case* it was decided that the mere fact of a party not having an interest did not make a paper written by him evidence.]

(a) 1 Peake's N. P. Rep. 45.

(b) *Gleadow v. Atkins*, 1 Cr. & M. 424.

(c) 7 East, 279.

Here it is stronger ; it is against his interest.

LORD CAMPBELL. — Your present argument is opposed to your argument on the Marriage Act ; for in that you contended that Mr. Gunn had nothing to fear, as what he did was not forbidden by law.

Sir T. Wilde. — But if he believed that he had offended against the law, that belief was sufficient ; his belief need not be well founded. The circumstances of the *Berkeley Case* are materially different from those of the present. This is the case of a person making a declaration when he believed it was his interest to suppress, not to make, that declaration. The necessity of the case would justify the admission of this evidence, and the interest which the law considers is not confined to pecuniary interest. If it is established that in the mind of the deceased party this declaration was contrary to his interest, and if it is further shown that he had the means of knowledge, and had no motive to misrepresent what he knew, his declaration is admissible in evidence. A verbal statement of a party, made contrary to his own interest, is always receivable in evidence. A person in occupation of an estate is assumed *prima facie* to be the owner in fee-simple, but the admission of such a person that he holds a less estate, though made by parol, may be received to cut down his interest. It may be so received because it is against his interest to make * the admission. The principle of * 108 law is clear, and it becomes more distinctly applicable when a question of fact, ascertainable a few years since by other evidence, has become difficult of proof by the deaths of parties who might otherwise have been called as witnesses. A dying declaration is admissible, because the person who makes it believes himself to be *in extremis*, and is supposed to have no motive to misrepresent, but every inducement to tell the truth.

LORD DENMAN. — There must be a real danger of death at the time when the declaration is made.

Mr, Erle. — A man is protected from answering when he believes that his answers may subject him to a prosecution.

[*LORD BROUGHAM.* — It does not follow, when a man is protected from answering because he believes himself to be in danger, that therefore his declarations on the matter respecting which he has been protected from answering in his lifetime, should, after his death, become admissible in evidence.]

But the existence of this protection furnishes the argument of analogy, that the fear of danger is a matter recognized by the law as affecting the testimony of a witness. The fact that he fears a prosecution will of itself protect him from being forced to answer ; and his declarations made when that fear might be supposed to induce him to suppress them are for the same reason admissible in evidence.

THE LORD CHANCELLOR. — This question has been put upon two grounds. It is contended, in the first place, that as *Mr. Gunn* might have stood indifferent on this occasion, as he had no interest and as he knew the facts, he being dead, his declarations are receivable in evidence. That is a position

which cannot be maintained in this House ; for in the
 * 109 *Berkeley Peerage * Case* that point was expressly decided the other way, on reference to the Judges. (a)

(a) The point thus referred to by the Lord Chancellor is only to be found in the minutes of evidence on the *Berkeley Peerage Case* (p. 655), printed by order of the House of Lords. It is thus stated : — “ Then *Sir Samuel Romilly* proposed to call *Mrs. Tucker* to prove declarations made by the late *Mr. Hupsman* ; first, with respect to the legitimacy of the claimant ; and, secondly, as to his having performed the ceremony of a marriage between the late Earl and the Countess of Berkeley. The Solicitor-General (*Sir T. Plumer*) and the Attorney-General (*Sir V. Gibbs*) were heard in objection to the evidence. *Mr. Serjeant Best* and *Sir Samuel Romilly* were heard in support of the evidence being received. The Attorney-General was heard in reply. The counsel were directed to withdraw. Then it was moved that the following question be put to the learned Judges : ‘ Upon the trial of an ejectment, in which it became

The clergyman there was dead ; his declarations were offered in evidence, as he had performed what was stated to be the marriage ; he was indifferent in point of interest. The question of the admissibility of his evidence was put to the Judges, and they were unanimously of opinion that it could not be received. So far as this House is concerned, we cannot again open that question, but must consider that decision of it as final.

The next ground of argument is, that in all the * cases where the party has known the facts and is * 110 dead, and has made declarations, and these declarations are against his interest, and would, if he had been living, subject him to a prosecution, such declarations are receivable in evidence. That is the broad and general proposition. That proposition cannot be sustained : let us try it by instances ordinarily occurring. A. is indicted for murder ; B., who is dead, made while living a declaration that he was present at the murder : that declaration is against his own interest, and would, had he lived, have subjected him to a prosecution. It is in principle the very case supposed in the argument, and it is not possible to say that such declaration would have been receivable in evidence. Again, suppose the

necessary to prove the legitimacy of A. B., the plaintiff offered to give in evidence the declarations of a deceased clergyman, who was the domestic chaplain of A. B.'s reputed father at the time of A. B.'s birth, that he had married the reputed father and the mother of A. B. in the parish church of which such chaplain was vicar ; and declarations that A. B. was the legitimate son of his reputed father. According to the practice of the Courts below, would such declarations as to the legitimacy of A. B., or as to the fact of the marriage, be received in evidence ? The same was agreed to, and ordered accordingly. Then the Lord Chief Baron (MACDONALD), having conferred with his brethren, delivered the unanimous opinion of the Judges present, that such declarations as to the legitimacy of A. B., or as to the fact of marriage, could not be received in evidence. Then it was moved to resolve that the evidence proposed to be offered of such declarations of Mr. Hupsman ought not to be received. The same was agreed to, and ordered accordingly. The counsel were again called in, and informed by the Lord WALSINGHAM, that it was the opinion of the committee that the declarations of Mr. Hupsman, proposed to be given in evidence on the part of the claimant, ought not to be received."

Duke of Sussex had been put upon his trial under the Royal Marriage Act, for contracting this marriage, is it possible to maintain that Mr. Gunn's declarations would have been receivable in evidence against him? It is sufficient to state these instances, to show that the proposition of the learned counsel cannot be maintained. It is not true that the declarations of deceased persons are in all circumstances receivable in evidence, when in some way or other they might injuriously affect the interest of the party making them. Nor is it true, that because, while living, a party would be excused from answering as to certain facts, his declarations as to those facts become evidence after his death. These are not correlative nor corresponding purposes. Besides, the case is not here, what for the purposes of this argument it is represented to be. First, Mr. Gunn is said not to have been liable to prosecution. Then these declarations were made to his own son; and in so making them, it cannot be presumed that he would have exposed himself to prosecution, or that he made them

* 111 under any * belief that he should do so. These two circumstances take away the main grounds on which the argument for the admission of these declarations has been rested. On no ground, therefore, can these declarations be, in my opinion, received in evidence.

LORD BROUGHAM. — I so entirely agree with my noble and learned friend, that I need scarcely trouble your Lordships further than to express my concurrence in what has been expressed in so luminous and convincing a manner. The case of *Higham v. Ridgway* declares the law on the point at issue. The more we look at that case, the more clearly must we come to two conclusions. In the first place, we must see that the evidence there was admitted, not because the subject-matter of the declaration was within the peculiar knowledge of the party making the declaration, but that it was a declaration made against an interest of a very specific nature; viz., a pecuniary interest. I may further say, that one of the learned Judges, who is now present to assist your Lordships, — I mean Mr. Justice WILLIAMS, — was a counsel in that very case, and argued it with Mr. Serjeant Manley in 1808, against

the admission of the evidence; and he remembers perfectly well that the evidence was received on the express and specific ground that it was an entry against the pecuniary interest of the party. Another conclusion to which we must come is that, considering the nature and tendencies of such evidence unless properly restricted, we ought to be careful and cautious of extending the rule, as laid down in the case of *Higham v. Ridgway*, beyond the limits settled by that case. To say if a man should confess a felony for which he would be liable to prosecution, that therefore, the instant the grave closes over him, * all that was said by him is to * 112 be taken as evidence in every action and prosecution against another person, is one of the most monstrous and untenable propositions that can be advanced. Lord KENYON never could have entertained the opinion or held the doctrine imputed to him in the case of *Standen v. Standen*. (a) The law in *Higham v. Ridgway* (b) has been carried far enough, although not too far. The rule, as understood now, is that the only declarations of deceased persons receivable in evidence are those made against the proprietary or pecuniary interests of the party making them, when the subject-matter of such declarations is within the peculiar knowledge of the party so making them.

LORD DENMAN.—I entirely agree with what has fallen from my noble and learned friends. I take the rule in *Higham v. Ridgway* to be as my noble and learned friend has just stated it. With regard to declarations made by persons in *extremis*, supposing all necessary matters concurred, such as actual danger, death following it, and a full apprehension, at the time, of the danger and of death, such declarations can be received in evidence; but all these things must concur to render such declarations admissible. Such evidence, however, ought to be received with caution, because it is subject to no cross-examination. As to the case of *Standen v. Standen*, I agree with my noble and learned friend, that it is doubtful whether Lord KENYON ever could have admitted the

(a) 1 Peake's N. P. 45.

(b) 10 East, 109.

evidence in the way there described ; but even if he did, it must be recollected that that was an issue from the Court of Chancery, in the trial of which the rules of evidence
 * 113 are sometimes relaxed, as the whole proceeding * is one simply for the information of that Court. The witness there came to bastardize his own issue ; he was discredited, and the verdict was against him. It never, therefore, became necessary to discuss the propriety of what had been done ; but that case has never since been acted on, and to me it seems to involve a very dangerous principle of law.

LORD COTTENHAM. — I beg simply to express my concurrence in what has already been said by the noble and learned Lords who have preceded me.

LORD CAMPBELL. — By the law of England the declarations of deceased persons are not generally admissible, unless they are against the pecuniary interest of the party making them. There are two exceptions: first, where a declaration by word of mouth, or by writing is made in the course of the business of the individual making it, there it may be received in evidence, though it is not against his interest. *Doe d. Patteshall v. Turford.* (a) The service of a notice may thus be proved ; and, in like manner, an entry by a notary's clerk that he had presented a bill, for that is in the ordinary discharge of his duty. But as to the point of interest, I have always understood the rule to be, that the declaration, to be admissible, must have been one which was contrary to the interests of the party making it, in a pecuniary point of view ; and, with the exception of *Standen v. Standen*, I do not know any case which appears to break in upon that principle. I think it would lead to most inconvenient consequences, both to individuals and to the public, if we were to say that the
 * 114 apprehension of a criminal prosecution was * an interest which ought to let in such declarations in evidence. But even if such a rule did exist, it would not permit the learned counsel here to bring in the statements of Mr. Gunn,

(a) 3 B. & Ad. 890.

for how are your Lordships to know what state Mr. Gunn's mind was in when he made the declarations? At that time of his conversation with his son, he might have entertained a very different belief from that which he laboured under when he demurred to the bill in Chancery, and refused to answer the interrogatories put to him there. He might have believed that the marriage having been celebrated abroad, the provisions of the Royal Marriage Act did not extend to it, and that he was in no danger whatever from what he had done.

LORD LANGDALE. — My Lords, lest it should be supposed that there is any difference of opinion on this point, I beg to say that I fully concur with the noble and learned Lords who have preceded me.

The declarations tendered were rejected.

The Right Rev. Nicholas Wiseman, D.D., having been called, and having begun to give his evidence on the law at Rome on the subject of marriage, referred, while doing so, to a work which was lying by him. This was noticed.

LORD BROUGHAM (to the counsel). — You had better state to the witness that he may refresh his recollection by referring to authorities on the matter of law to which his evidence is addressed.

THE LORD CHANCELLOR. — Do so. The witness may thus correct and confirm his recollection of the law, though he is the person to tell us what it is.

LORD CAMPBELL. — The most authoritative form of * getting at foreign law is to have the book which lays * 115 down the law. Thus we have had the Code Napoleon in our Courts. It is better than to examine a witness, whose memory may be defective, and who may have a bias influencing his mind upon the law.

LORD BROUGHAM. — My opinion entirely concurs with that

of the Lord Chancellor. The witness may refer to the sources of his knowledge; but it is perfectly clear that the proper mode of proving a foreign law is not by showing to the House the book of the law; for the House has not organs to know and to deal with the text of that law, and therefore requires the assistance of a lawyer who knows how to interpret it. If the Code Napoleon was before a French Court, that Court would know how to deal with and construe its provisions; but in England we have no such knowledge, and the English Judges must therefore have the assistance of foreign lawyers.¹ This was fully considered in *Dalrymple v. Dalrymple*, (a) in which the opinion of the Scotch lawyers was taken as a matter of fact, they being examined upon oath. In those opinions they referred to Scotch statutes and Scotch law-books. It was agreed on all hands, that that which was there in evidence were not the mere statements of foreign text-writers, but the opinions of skilful and scientific men who were examined on oath.

LORD DENMAN. — There does not appear to be, in fact, any real difference of opinion upon this point. There is no question raised here as to any exclusive mode of getting at this evidence, for we have both the materials of knowledge * 116 offered to us. We have * the witness, and he states the law, which he says is correctly laid down in these books. The books are produced, but the witness describes them as authoritative, and explains them by his knowledge of the actual practice of the law. A skilful and scientific man must state what the law is, but may refer to books and statutes to assist him in doing so. That was decided, after full argument, on Friday last, in the Court of Queen's Bench. (b) There was a difference of opinion, but the majority of the Judges clearly held, on an examination of all the cases and after full discussion, that proof of the law itself, in a case of foreign law, could not be taken from the book of the law, but

(a) 2 Hagg. Cons. Rep. 54.

(b) *Baron de Bode's Case*, tried at bar in the Court of Queen's Bench, 20 June, 1844. Not yet reported.

¹ See *In re Coppin*, L. R. 2 Ch. Ap. § 3.

from the witness who described the law. If the witness says, "I know the law, and this book truly states the law," then you have the authority of the witness and of the book. You may have to open the question on the knowledge or means of knowledge of the witness, and other witnesses may give a different interpretation to the same matter, in which case you must decide as well as you can on the conflicting testimony; but you must take the evidence from the witnesses.

LORD CAMPBELL. — I entirely concur with the law as laid down by the noble and learned Lord who has just spoken. The foreign law is a matter of fact to be proved by evidence. You call witnesses to prove that fact; you ask the witness what the law is. He may from his recollection, or on producing and referring to books, say what it is, or that it is found correctly stated in such a book. He may here produce the book, and say that that is according to the law of * Rome. So likewise he may take the book to refresh * 117. his memory.

LORD LANGDALE. — The question here is, how a witness as to what is foreign law is to be examined; in what form and manner he is to give his testimony. Foreign law is, in the Courts of this country, a matter of fact. A witness, more or less skilled in it, is called in to depose to it. He may state what it is from his own knowledge, or assist his own knowledge by reference to books and authorities that are within his reach: he may refer to text-books, or to books of decisions, and so render his knowledge more accurate than before.

The witness went on to state what was the law of Rome, and what the practice of the Roman Courts, on the subjects of marriage generally, and of marriages between Protestants in particular. (a)

The Right Rev. Nicholas Wiseman, D. D., was then recalled, and the following examination took place: —

(a) This part of the evidence is not reported, as the question put to the Judges rendered the consideration of it unnecessary.

I am a Roman Catholic bishop.

I am coadjutor to the bishop, who is vicar-apostolic of the central district of England at present.

I preside over the Roman Catholic college at Oscot.

I resided at Rome from 1818 till 1840.

I was the superior of the English college for several years during that period.

In the event of any questions arising in England relating to the validity of Catholic marriages, the vicars-apostolic in England have the same jurisdiction in respect of such cases which any bishop would have upon the Continent.

* 118 * I have had as fair an opportunity as might be expected to become acquainted with the practice and doctrine upon the subject; but if the office to which the question refers is my present office, I should say that it would be an important part of my duty at present to make myself acquainted with the law upon the subject.

In my office as coadjutor.

I have held that office in England four years.

I came to this country immediately from the office of superior of the English college at Rome.

I am aware of the law that prevails at Rome, usually described as the Council of Trent.

The law at Rome by which the marriages of Roman Catholics are regulated, is the law of the Council of Trent, which declares that a marriage, to be valid, must be in the presence of the parish priest and two witnesses.

There has been no regulation upon the subject of the marriages of Protestants, and I could not refer to any decree which went to define any thing relating to the marriages of Protestants in Rome.

There are authorized publications of the Council of Trent, which are acted upon as authorities by the judicial tribunals at Rome.

The canons of that council of course are perfectly known, in the same way that any other judicial decisions or any public enactments are known. The canon was published, and its decrees communicated officially to the whole church; and any edition of it that might be considered as coming

from an authorized press, as from the one in Rome, would certainly be admitted as sufficient evidence.

In answer to questions by the Attorney-General, the witness said, — I have been a member of one of the * ecclesiastical tribunals, but not one into which such * 119 cases as this would come. I have had no personal experience of the administration of the law at Rome.

The Attorney-General submitted that sufficient foundation had not been laid for receiving this evidence, by proving that the witness was qualified, from his office or means of knowledge, to give evidence upon this subject.

The committee desired that he might be further examined on this subject.

The witness then underwent the following examination: —

I have studied the canon law.

I have not gone through a regular course of canon law ; but for the discharge of my duties it has been of course necessary that I should make myself acquainted with the canon law upon all those points upon which it is applicable to cases that may arise ; and among others, of course, to matrimonial cases, so as to form my own opinion upon the subject.

All that relates to matrimonial cases would come, of course, before me in my present office. A case might arise in which two Protestants, having been married abroad, came into this country, and became Catholics ; and it would be my duty to decide whether they should be separated or remarried, or whether I should hold their marriage valid.

In disposing of those cases which come as it were officially before me here as coadjutor to the bishop for the central division of England, I should govern myself by the canon law, as far as it is applicable to cases of that kind. I should do so by the canon law of Rome.

To enable me to perform the duties of the office I hold, I have studied the canon law respecting marriage * which prevails now at Rome, and govern myself by * 120 that law in my decisions.

The Attorney-General. — Surely the decree of the Council

of Trent is no part of the law you ever administer here, is it?

That decree is not.

That decree is a portion of the law of Rome, is it not?

Certainly.

And therefore the canon law you administer here is not the same law of marriage as is administered at Rome?

It is the same law; because that very decree would come under my notice, as in the case I have stated, where I should be obliged to decide upon the law of Rome or other Catholic countries, in case persons married, in those countries, Protestants who came into my jurisdiction. It would be my duty to decide with respect to them, and the law which would decide their case would be, of course, the law as administered in other countries.

Suppose a question as to the validity of a marriage between Roman Catholics in Ireland, where that decree of the Council of Trent has been received, should come before me, I should be guided by the decree of the Council of Trent in deciding upon the validity of that marriage.

No instances have ever come before me of a marriage of two Protestants at Rome, nor of the marriage of two Protestants in any Catholic country where the decree of the Council of Trent was received as law.

I do not know any actual instance in which a marriage of Protestants has come before me, where that marriage has been solemnized according to the Protestant form in a Catholic country in which the Council of Trent has been received.

* 121 * I do not know any decision with respect to Protestant marriages by the tribunals at Rome.

All the higher tribunals there are in the hands of the ecclesiastics entirely.

I have not directed my attention expressly to prepare myself for those higher offices.

I could not say that I have gone through a legal education.

I have gone through the studies usual for ecclesiastics, but not usual for ecclesiastical lawyers.

I should not say that I have gone through such a course of study as would qualify me to be a judge in the ecclesiastical tribunals; because it is necessary to take a degree of doctor of laws, and to go through a full course of civil ecclesiastical law for the purpose, and I have not done that.

There is a tribunal called the penitentiary at Rome.

It consists of a board of cardinals, with their officers, whose duty it is to examine into cases connected with crimes and guilt of different sorts.

A matrimonial question might come before me in my official capacity as coadjutor of the bishop in this form: I might have to decide whether, for example, the marriage was valid or not; for instance, if there had been a canonical or an ecclesiastical impediment, which made the marriage void *ab initio*, it would be my duty to decide upon it.

I should decide for the purpose of separation or remarrying. I should decide in such a case *pro salute animæ*.

Merely with a spiritual view.

The validity or invalidity of a marriage would not come before me in my spiritual capacity with a view to censure or penances which I might impose upon *the *122 parties alone, for there might be no penance and no censure; but simply to set it right with respect to the spiritual consequences.

The validity of a Protestant marriage could never come before me except with a view of the parties becoming Catholics afterwards.

The question of marriage is an ecclesiastical question decided by the ecclesiastical law at Rome.

My duties led me into communication with the ecclesiastical authorities of Rome. My decision upon the question of marriage or no marriage, which is an ecclesiastical question, would be of authority at Rome if it was unappealed from.

If I decided a case here in England upon a question of marriage, that decision would have weight in a Roman tribunal.

I do not presume that I have means of knowing the law upon this subject more than any other learned Roman Catholic ecclesiastic. For example: as to this question I have considered it myself; I have looked into the authorities, and

I have conferred with many persons concerning it, and I have formed my judgment from those various sources, as I should upon any other point upon which I should be called upon to exercise a practical judgment.

It has been part of my duty and my object to acquaint myself with the state of the ecclesiastical law at Rome upon the subject of marriage.

I have studied for that purpose.

I have been appointed an ecclesiastical judge in this country by the court of Rome, in matters relating to ecclesiastical jurisdiction. I have been appointed as any other bishop or vicar-general might be, and no further.

There is not any ecclesiastical authority in this
* 123 * country to decide upon the subject of marriages, except the Catholic bishops.

The persons holding that office are generally the authorities which have jurisdiction throughout Catholic countries to decide upon questions of marriage.

That is, matrimonial cases, as far as the canon law and ecclesiastical law affect them, belong to the jurisdiction of the bishops.

I am one of those bishops.

I never gave lectures upon ecclesiastical law at Rome.

I have filled the office of bishop in this country for four years.

The canon law at Rome governs both temporal and ecclesiastical law.

I have had no practical experience, either as an advocate or as a judge, in any court at Rome.

Sir T. Wilde and *Mr. Erle*, in support of the witness's admissibility. — This witness stands in the situation of a person who ought to be received to give evidence on this subject. It never has been laid down that the only individuals competent to give evidence upon foreign law are those who are professionally qualified to practice. Even persons engaged in trade have been received to prove foreign law. On this question of marriage, the highest authority is not, in Rome, vested in professed lawyers. The witness here has

studied at Rome as an ecclesiastic ; he became head of the university there. He is now a Roman Catholic bishop in this country, charged with the duty of deciding on questions of marriage, whether they are regular or not, or are *ab initio* void ; and his decisions on this matter would be received as authoritative at Rome. Legal advocates are never promoted to the office of * bishop ; but the authorities * 124 at Rome say that the bishop is the person to decide on the question of marriage. The person promoted to that office is, by the laws of Rome, considered best fitted to decide on that question according to those laws. The evidence of a man who has studied abroad has been taken on such a subject. In *Lord Cloncurry's Case* a single priest was examined. If a barrister or advocate can alone be examined on this matter, then a man who had been for twenty-five years Attorney-General in some of our colonies (where that office is not necessarily filled by a barrister) could not be heard to give evidence as to the laws of the colony where he had so long held office.

[LORD BROUGHAM. — Yes, the possession of that office would give him the right. He would be *peritus virtute officii*.]

The cases of *Lacon v. Higgins* (a) and *Ganer v. Lady Lanesborough* (b) are decisive on this point. In the latter the question was as to the validity of a foreign divorce, and a Jewess was there permitted to give parol evidence of her own divorce in Leghorn, according to the custom of the Jews there.

[LORD BROUGHAM. — Your proposition goes to this extent ; that any foreigner can be called to prove the law of a foreign country.

THE LORD CHANCELLOR. — In *Ganer v. Lady Lanesborough* the woman was called to prove the custom, not the law.]

(a) 3 Stark. 178; Dowl. & R. N. P. C. 38.

(b) 1 Peake's N. P. C. 25.

In the case of *The Queen v. Dent*, (a) where proof of the Scotch law was required, a witness was tendered, and it was objected that he was not of the legal profession; it was answered that it was not necessary that he should be of any particular profession, but that if he satisfied the Judge that he possessed in fact sufficient knowledge, he was

* 125 *admissible as a witness; and Mr. Justice WIGHTMAN adopted that argument, and admitted the witness. It cannot be objected here that the judgment of this witness in his office can only affect the party *pro salute animæ*; for such an objection would exclude from our Courts the testimony of Dr. LUSHINGTON as to what was the law in the Court where he presided. Here the witness exercises a judicial office, the decisions of which would be received and acted on by the highest tribunals in Rome.

THE LORD CHANCELLOR. — There are two questions here. First, whether, independently of the jurisdiction exercised by Dr. Wiseman, his evidence would be admissible. If not, then, secondly, whether that jurisdiction, whether his office here, will render that evidence admissible. So you had better examine him with respect to the nature and duties of his office.

The witness's examination then proceeded as follows: —

The authorities in this country from the See of Rome, that have power to decide upon questions arising between Catholics respecting marriage, are the vicars-apostolic of England.

Their authority is limited with respect to the power of dispensing in certain cases, in which they are obliged to have recourse to the supreme authority at Rome; with the exception of those cases, the powers are the same as would be exercised in Rome itself. I ought to observe that I stated myself to be the coadjutor to the vicar-apostolic. It might be necessary to explain in what relation I am: I am appointed by the Holy See, with the character of bishop, to

(a) 1 C. & K. 97.

assist the bishop in the administration of his diocese, receiving participation in all his faculties and powers from him ; * that participation being sanctioned, of course, * 126 to the full extent to which he gives it, by the Holy See.

With respect, therefore, to matrimonial cases, I am in possession of the same administrative faculties which he exercises.

I have during my residence in this country frequently exercised that jurisdiction.

I am guided by the ecclesiastical law of the church as applicable to this country ; for instance, as to the case of clandestinity, or any matter involved in that decree of the Council of Trent, I should have to administer for England as for a country in which that decree is not promulgated ; but if cases came before me from other countries in which it is promulgated, I should have to decide according to the practical judgment I should form of the force of that canon in those countries.

Supposing a question relating to a marriage contracted in a Catholic country abroad should arise between two Catholics in this country, it would become my duty and part of my jurisdiction to decide the question, whatever it might be, relating to that marriage.

There are not any questions which could come under judicial decision at Rome, relating to a marriage between two Catholics in a Catholic country, which are not within my jurisdiction, supposing the same questions to arise between two persons in this country who had so married abroad.

The decision of any case of marriage could be fully made in this country. Cases of complication and difficulty might arise which I might think it expedient to send to Rome for solution, in order to have the benefit of the opinion of others, but it would not be from limited jurisdiction.

* I might, as other bishops, take advice from Rome, * 127 but the matter would be within my jurisdiction.

I have authority to determine whether a marriage between two Roman Catholics is or is not a valid marriage.

I have also authority to determine whether it is a regular or an irregular marriage.

And to subject the parties to penance, if it is irregular.

If two Roman Catholics go through a ceremony of marriage which is not a marriage, I declare it to be void.

I apply to that such of the ecclesiastical laws of Rome as are in force in this country.

I apply that to marriages contracted in other countries.

The law I should apply as relating to a marriage contracted at Rome, would be the law as I consider it held at Rome.

If the marriage was contracted here, I should apply so much of the law of Rome as is applicable here; and if the marriage was contracted at Rome, I should apply to it the law of Rome as relating to marriage.

I decide with respect to the validity of marriages; whether a marriage is a good marriage or whether it is void, whether it is a regular or irregular marriage; and I have all the jurisdiction that the ecclesiastical courts have in Rome.

My functions and jurisdiction are confined purely to spiritual purposes.

When I sit for the purpose of deciding these matters, I am under no obligation; I have no court. I, of course, make it a rule of conscience to take the best advice that I can, especially in cases, which constantly occur, of the validity

* 128 of marriages, which are coming * before me certainly oftener than every month. I always take the advice of such theologians and persons as I can consult. The case is accurately studied; and in those books which have been referred to, the authorities are collected, and I form my judgment according to them. Often the case is so simple as to require no consideration.

The cases are not argued before me.

We have no professional lawyers, ecclesiastical advocates, in England, whom I can consult.

I frequently send cases over to Rome.

I should consult persons, for example, who would be employed in the tribunals, or who had been employed in them, and who knew the practice of the law, and get their decisions; but some cases I should refer at once to the tribunals themselves, when they were very complicated.

The tribunals at Rome would respect my decisions, and act upon them.

It is the practice for bishops holding the office I do, and deciding questions such as I refer to, occasionally to refer to Rome for advice upon particular cases.

The law-books at Rome show that that has been the course for centuries.

There are volumes of decisions made upon the demands of the bishops for explanations.

It is the course for such cases to be submitted to and decided by the authorities at Rome, without being argued before them.

They are sent from the bishop direct, and they decide upon his representation.

I have the power of deciding whether a marriage is valid or invalid ; suppose I decide it to be invalid, the parties would be obliged to separate, unless I * granted a * 129 dispensation, or, if it was not within my faculty, procured it for them ; but until such dispensation was granted they would have to separate.

Suppose they did not separate ?

Then of course they would not be admitted to participation in the rites of the church, — to the sacraments of the church.

Therefore my jurisdiction is entirely confined to spiritual censures, and to consequences of an ecclesiastical kind.

I should have no power to affect the property or the civil rights of the parties in this country, except in *foro conscientie*.

At this moment I do not remember a case in which I have had to inquire in this country into a marriage which had taken place abroad.

It has never occurred to me to have to decide in this country any question upon the validity of a marriage which had taken place at Rome.

I have had a great many matrimonial cases that were Irish cases, but at this moment I cannot remember a specific case.

I have had to inquire whether at the time the marriage

took place, the Council of Trent had been promulgated in that given diocese; and I have had to write to Ireland.

In cases of marriage contracted abroad, but in which the parties had come into my jurisdiction, then of course any question of marriage comes under my consideration.

There is a superior tribunal at Rome which could call any decision of mine to account, and could re-examine the case, but, *primâ facie*, the tribunals there would take my decision as that of the ordinary tribunal in the case.

* 130 * My decision would stand till it was reversed.

I do not contemplate a case of a marriage contracted at Rome coming under my jurisdiction in this country, and having to be decided by me; but if it did, and the case were afterwards sent to Rome, in that case they would take my decision as they would that of any other bishop in the church, of course, having the power of examining it. If the case had occurred in Rome, where the witnesses could be had, the case would be more likely to be gone into at Rome than another case that happened here. In fact, if the case had happened in Rome, I should hesitate about deciding upon it, because I should think that the natural place for it to be decided would be at Rome.

But supposing the parties were here, and one of them was to appeal to my jurisdiction, I should decide as I should in any other case.

And in that case, in the estimation of the Roman tribunals, my judgment would be a standing judgment till it was reversed.

I have never had an instance of that kind brought before me.

I have not known any such thing occur as a decision given by a bishop in this country upon the validity of a marriage at Rome, which was held to be entitled to weight at Rome.

Matrimonial cases ordinarily come before me in two ways. One is consultively, when persons come before me as a Judge, and I have to give a decision whether a given case is a case of valid marriage or not; in that case frequently they come upon petition. In other cases they come what might be

called penitentially; that is, persons who have been living in a state of supposed marriage, which was null, * and who for remedy wish to be married, and to have * 131 a dispensation granted. Such a case comes before me either on the application of the parties themselves, or of their clergyman.

They might come contentiously before me, but I have never had a case of that kind.

I do not recollect ever having had a case before me of a litigated marriage, where the parties have been contending one against the other, but I certainly have the jurisdiction to decide such cases.

I know what the process is in the English Ecclesiastical Courts in a suit for restitution of conjugal rights.

Such a case has never occurred in my jurisdiction. It would partake more of a mixed than a purely spiritual nature.

I do not know what jactitation of marriage is in the English law.

We have never had a case where a party wishes to obtain a decree declaring that a supposed marriage is invalid; but such cases might occur.

Where it is for purely spiritual purposes, such cases would be within my jurisdiction. If they involved civil rights, I should not assume jurisdiction.

But if the parties would submit to the decision as a spiritual one, and act upon that decision, in that case civil consequences might follow.

Supposing that A. and B. came before me, and that A. said that B. pretended that they were man and wife, and A. denied that there was any such marriage between them:

I should have no power to hear evidence, to summon people before me, or to hold a court; and therefore I could only treat the case as between the two parties.

* Where both the parties submitted to my jurisdiction, but opposed each other contentiously, I should * 132 have a right to decide the point of law,—to decide what was their duty.

A contentious suit might originate before me, in the way that was mentioned just now; that case might come before

me, where one of the parties might make application, stating that he did not consider himself married to the other, and asked for a separation; and where the other party, the woman, might maintain that she was married. The case might be referred to me for judgment by the parish priest, or by the parties themselves.

But supposing there was a contentious suit, —supposing one party wanted to proceed against the other, but the other was unwilling to submit, — I could have no right to force either of the parties, except by spiritual means. I could tell that person, It is your duty, if you are married, of course, to abide my judgment; my decision is, that you are married.

I should, under such circumstances, decide whether they were living in wedlock or living in fornication.

Whether it was a valid marriage or not, as far as I could have the evidence before me; but I could not compel evidence in any way, undoubtedly.

Supposing I declared the marriage void, and those parties lived together afterwards at Rome, the authorities at Rome might or might not act upon my judgment, and compel those persons by ecclesiastical censures to separate.

I do not know that they would act, because they are very prudent and very cautious; and I do not know an instance in which they have acted with regard to strangers, in separating them, or entering into those questions.

* 133 * With respect to English subjects, they would not interfere, unless the matter came in the way of police.

Supposing two Italian subjects were in this country, and a question arose with regard to their marriage, and I pronounced it void, my judgment would be treated at Rome, for all ecclesiastical purposes, as a judgment, until reversed.

And civil rights would be administered upon the footing of that judgment?

If they had my attestation that they had not been married in this country, and that I considered the marriage they had contracted to be null and void, the Roman court would act upon that judgment till it was reversed.

Supposing two Catholics in this country, and that one of the parties chose to live separate, and the other wished to

continue to live in a married state, it would be competent to the person wishing to live in a married state to apply to me, purely upon ecclesiastical grounds, to call upon the other to live according to the contract of marriage.

After I had pronounced the marriage to be valid, and called upon them to live together, the person that did not obey would be subject to ecclesiastical censure.

The court of Rome would in such a case deal with my judgment in like manner as in other cases I have stated.

The only difficulty is, how such a case would be likely to be brought before it.

My statement is, that my judgment, upon all questions within my jurisdiction, is a judgment accredited at Rome until reversed.

The Attorney-General. — The witness is clearly not * a professional lawyer. To render his evidence admis- * 134 sible he must have some peculiar means of knowledge, as from office, for instance. Whether he has so or not the committee must decide.

THE LORD CHANCELLOR. — He comes within the description of a person *peritus virtute officii*. I ought to say at once, that it is the universal opinion both of the Judges and the Lords, that the case (*The Queen v. Dent*, 1 Car. & K. 97), as represented to have been decided by Mr. Justice WIGHTMAN, is not law.

LORD LANGDALE. — The witness is in a situation of importance; he is engaged in the performance of important and responsible public duties; and connected with them, and in order to discharge them properly, he is bound to make himself acquainted with this subject of the law of marriage. That being so, his evidence is of the nature of that of a judge. It is impossible to say that he is incompetent.

The counsel was informed, that the committee was of opinion that the witness came within the description of a person *peritus*, and that therefore his evidence was admissible. He was then examined, and gave evidence to the

effect that the marriage contracted in this case was valid by the law of Rome. After he had concluded his evidence, some discussion ensued as to whether the claimant might call any additional witnesses on the point of the marriage law, should the Crown produce evidence to meet that which had been already adduced.

THE LORD CHANCELLOR. — The Solicitor-General has heard all the evidence. I do not think that the junior counsel for the claimant can be called upon to sum up the case till * 135 he knows whether this is all the evidence * that will be required on this point; and the counsel for the Crown ought now to elect what course they mean to adopt, and to say whether they will or will not call evidence. *Sir T. Wilde* ought, however, to understand that he cannot be allowed, unless as evidence in reply, to call any other evidence than what he may think fit to do before he closes his case. He wishes, if the Crown should think it right to call evidence, that he may have the opportunity to produce additional evidence. That is not a position of things which can ever be acceded to.

The Solicitor-General was not prepared to make his election at that moment.

Sir T. Wilde, after a short consultation with his learned colleagues, said that he would take upon himself to close the claimant's case upon the evidence as it now stood.

Mr. Erle then proceeded to sum up the case of the claimant. He first of all discussed very fully the questions of the marriage in fact, and of the validity of that marriage by the law of England and the law of Rome. (As the decision turned wholly on the construction of the Royal Marriage Act, this part of his argument is omitted.) The remaining question is, as to the application of the Royal Marriage Act. The enactment in the first clause is one which annuls and renders void a marriage made contrary to the provisions of that Act. The expression, as to every descendant of Geo. 2,

is said to be equivalent in its effect to a clause extending to all marriages contracted within or without the realm of England. This is a statute passed to deprive certain persons of a natural right, a right sanctioned and enforced * by the law both of God and man, or at least to pre- *136 vent those persons exercising that right, unless in a very limited and restricted manner. Can such a law, without any direct and express provisions, apply to marriages contracted in a foreign country? It is a general rule in the laws of all countries, that *leges extra territorium non obligant*. An Act of Parliament may be so worded as to operate on all Englishmen everywhere; but unless it is so worded, its operation must be confined within the realm of England. The recent Slave Trade Suppression Act, 6 & 7 Vict. c. 98, is an instance where that rule was expressly acted on. The 5 Geo. 4, c. 113, was directed to the same purpose, and many of the acts there prohibited were acts which could not be done within the realm of England; yet for want of express words extending the operation of that Act to foreign countries, it could not be applied to persons who there did the very acts which it was intended to prohibit. The Act against bigamy, 1 Jac. 1, c. 11, enacted in the broadest terms, that if a man being married shall marry again, he shall be guilty of felony. Under that statute, a man who, having married here, went abroad, and during the life of his wife there married another woman, could not be punished. (a) It may be true that the rule as to criminal laws not affecting a man beyond the limits of the country in which they were made, was applicable there, and affected the operation of the statute; but it did so only because of the omission of the word "wheresoever," or the words "in England or elsewhere," or other equivalent expressions; and this objection was held applicable in the same manner to the 35 Geo. 3, c. 67; and, therefore, when the 9 Geo. 4, c. 31, was passed, the words "within the realm of England or elsewhere" were introduced to get rid of the difficulty. The same rule has been * held in Ire- *137 land, where the Statute 9 Will. 3, c. 8, against mixed

(a) Anonymous, Sid. 171.

marriages, was rendered inoperative as to marriages out of Ireland, by the want of some such expressions: and another Irish Act, the 2 Anne, was passed to supply the defect, and there the words "out of the realm" were introduced. For the same reason the two Irish Statutes 9 Geo. 2, c. 11, and 19 Geo. 2, c. 13, were held to operate in Ireland, and not beyond its territory. The English Statute 15 Geo. 2, c. 30, declaring that if any lunatic should marry, every such marriage should be null and void, was for the same reason inoperative out of England. And it is yet doubtful whether the 5 & 6 Will 4, c. 54, prohibiting all marriages of persons within certain degrees of relationship, and declaring such marriages absolutely null and void, would apply to such marriages contracted by British subjects out of the realm of England.

THE LORD CHANCELLOR. — With respect to the statute just mentioned, I wish to observe that I am supposed to have brought in a bill to prohibit a man from marrying his former wife's sister; I did no such thing. The statute simply says that such a marriage shall be void, not voidable. The statute was passed merely for the purpose of getting rid of the doubt which might for years leave two parties and their children in the belief that a valid marriage had taken place, subject in fact to have that marriage declared void by a suit instituted just before the death of one of the parties. As to the last Act relating to the slave-trade, it was absolutely necessary to be passed; for the former did apply in some instances, and it was necessary to draw the line to show distinctly where it was and where it was not applicable.

* 138 * *Mr. Erle*. — The principle contended for is, however, proved by these Acts. In the Acts against usury, 13 Eliz. c. 8, and 12 Anne, § 2, c. 16, words of the widest signification were employed, but it was held that they applied only to contracts made in England, and did not apply to those which were made elsewhere, and the 14 Geo. 3, c. 79, and 3 Geo. 4, c. 47, were passed to remedy the defect. The same observation applies to the gaming statutes, 16 Car. 2, c. 7, and 9 Anne, c. 14.

THE LORD CHANCELLOR. — Suppose a divorce case, where parties are to be prohibited from marrying, what words must be used to effect that object?

Mr. Erle. — The Act must expressly name the parties, and prohibit them from marrying anywhere. The rule of limited construction of such an Act as this is especially applicable to cases of marriages: first, because the principle of all law is to favour marriage as the most important of all natural and civil rights; and, next, because of the universal rule of law, that marriages valid by the law of the place where they are celebrated are valid all over the world. It would be an infraction of the most important principles of law if the committee should decide that a general Act of Parliament, making void a certain class of marriages, could impose a personal incapacity on a party to whatever country he might go, though by the law of that country his marriage was good. It could only be out of excessive caution that it was considered necessary to ask the consent of the Sovereign of this country to the marriage of the son of the present King of Hanover. The law of the place of the contract must alone decide on its validity. *Scrimshire* * v. * 139 *Scrimshire* (a) recognized that doctrine, and it was there said, that from the mischief and confusion that would arise to the subjects of all countries if that was not the rule, it must be inferred that by the general consent of nations, contracts of this kind must be determined by the laws of the country where they were made. How otherwise would it be possible to decide, where two parties had different places of residence? From the time of that case (1752) to this moment the national faith of this country has been pledged, that the law of the place of the marriage is binding upon the law of England. *Compton* v. *Bearcroft* (b) and *Ryan* v. *Ryan* (c) adopt that principle. A different rule would be most mischievous. It would enable a man to get

(a) 2 Hagg. Cons. Rep. 395, 417.

(b) 2 Hagg. Cons. Rep. 443, 444, n.; Bull. N. P., 6th ed. pp. 113, 114.

(c) 2 Phill. 332.

married at a foreign place, and give him the privilege of breaking his marriage when he came back here. The language of the Court in *Scrimshire v. Scrimshire* leads directly to the conclusion that the law will not permit such mischievous inconsistencies; and so does the language of this House in the cases of *Warrender v. Warrender* (a) and *Birtwhistle v. Vardill*. (b) Incapacity exists in many cases in law. It is said that an infant is incapable of binding himself except for necessities; that he is incapable of borrowing money and doing many other things; and yet it is unquestionable that this supposed incapacity, if set up as a defence in a country where a contract is attempted to be enforced, must be shown to be applicable to the contract in the country where that contract was made. *Male v. Roberts*. (c)

* 140 That is the case in other countries * as well as in England. France affords, perhaps, the only exception to the rule. The Code Civil, in the Preliminary Title, (d) says, that "the laws relating to the state or capacity of persons govern Frenchmen, even when residing in a foreign country." But in another part of the Code (e) this general proposition is limited by a specific declaration, that "the marriage of a Frenchman in a foreign country shall be valid if celebrated according to the forms used in such country." It goes on to provide for the observance of certain forms, which it is manifest could never be required nor observed in any country where the law of France did not prevail, and the general declaration must therefore be taken as overriding the specific provision; and, in fact, the Courts of France have often held that a marriage of a French subject, celebrated according to the law of the place where it was contracted, was valid. This principle has again and again been distinctly upheld by the American Courts; and Story (g) refers to cases where men struck with incapacity by the rules of law in their own State, went away into another for the

(a) *Ante*, Vol. II., p. 488.

(b) *Ante*, Vol. II., p. 571; and Vol. VII., p. 895.

(c) 3 Esp. Rep. 163.

(d) Art. 3.

(e) Art. 170.

(g) *Conflict of Laws*, c. iv. § 102 *et seq.*

purpose of evading the law, performed the act which they were incapable of performing in their own State, and then returned to that State where the validity of what they had elsewhere done was acknowledged. One of these cases was the marriage of a white man with a black woman, such marriage being absolutely prohibited in the State to which the man belonged. This principle is so important, that unless the legislature has most clearly and expressly declared an intention to avoid it, such intention cannot be implied. Dwarris on Statutes. (a) The passing of this Act was strongly opposed, and it * may reasonably be sup- * 141 posed that the words which are necessary to give it effect abroad were purposely left out. Her present Majesty (had she married before her accession to the throne), the Princess Charlotte, and the Princess Augusta of Cambridge, might have married, and their issue would have been exempt from the operation of the Act. It does not extend to Ireland, and therefore there can be no doubt, that if the line of succession should come into the Duke of Sussex, the present claimant would be entitled to the allegiance of Ireland. That country, for such a purpose, stands in the situation of a foreign country, —

[LORD BROUGHAM. — Not as to purposes of the succession of the Crown, for there is an Irish Act which gives the Crown of Ireland to any one who holds the Crown of England.]

The words of this Act are indefinite and vague, and cannot be permitted to have effect against the great principles of the law which all nations have recognized. There has been clearly a marriage in fact, in this case, one which by the general law of England would be valid, but which is sought to be avoided by the doubtful terms of this Act of Parliament, by straining the words of a disabling and penal statute. No such violation of known and universally recognized principles will be sanctioned by this committee.

(a) Vol. 2, p. 647.

THE LORD CHANCELLOR. — I propose to put a question to the Judges. It is upon the construction of the Royal Marriage Act. If the Judges should wish for any further argument, any argument from the Attorney-General, they will intimate their wishes to me, and I will take care to make the necessary arrangements. I propose to submit the following question to the Judges: —

* 142 “Evidence being offered of a marriage solemnized * at Rome in the year 1793, by an English priest, according to the rites of the Church of England, between A. B., a son of his Majesty King George 3, and C. D., a British subject, without the previous consent of his said Majesty, assuming such evidence to have been sufficient to establish a valid marriage between A. B. and C. D. independently of the provisions of the Statute 12 Geo. 3, c. 11, would it be sufficient, having regard to that statute, to establish a valid marriage in a suit, in which the eldest son of A. B. claims lands in England, as heir of A. B., by virtue of such alleged marriage?”

The Judges requested time to consider the question, which was granted.

July 9.

Lord Chief Justice TINDAL now delivered the opinion of the Judges. — In answer to this question, I am requested by my brethren to inform your Lordships, that it is the unanimous opinion of all the Judges who have heard the argument in this case, that assuming the evidence given to have been sufficient to establish a valid marriage between A. B. and C. D. independently of the provisions of the Statute 12 Geo. 3, c. 11, it is not sufficient, having regard to that statute, to establish a valid marriage in a suit, in which the eldest son of A. B. claims lands in England, as heir of A. B., by virtue of such alleged marriage. The question turns entirely upon the legal construction of that statute, and is shortly this: whether, to bring a marriage within the prohibition of that statute, it is necessary that it should have been contracted within the realm of England; or whether the statute extends to prohibit and to annul marriages, wherever the same be contracted or solemnized, either within the realm of England or without?

* It is scarcely necessary to observe, that as your * 143 Lordships' question states that A. B. is a son of his late Majesty King George 3, it applies to a descendant of the body of his late Majesty King George 2, not being the issue of any princess married into a foreign family; so that A. B. falls precisely within the class or description of persons with respect to whose marriage the statute intends to legislate; and that, as he falls within that description or class, the statute may be considered as if it had been passed with respect to him personally and individually; as if it had enacted in express terms, "That A. B. shall not be capable of contracting matrimony without the previous consent of the reigning Sovereign, signified under the Great Seal, and declared in Council." And again: "That the marriage of A. B., without such consent first had and obtained, shall be null and void to all intents and purposes."

My Lords, the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe mean of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice DYER, (a) is "a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress."

* And, looking to all these grounds of interpretation, * 144 we think they concur, in the present instance, in demanding that construction of the statute at which we have arrived. For, in the first place, the words of the statute itself appear to us to be free from ambiguity. The prohibitory words of it are general: "That no one of the persons therein described shall be capable of contracting matrimony." And

(a) *Stowell v. Lord Zouch*, Plowden, 369.

again : “ That every marriage or matrimonial contract of any such person shall be null and void to all intents and purposes whatsoever.” The statute does not enact an incapacity to contract matrimony within one particular country and district or another, but to contract matrimony generally, and in the abstract. It is an incapacity attaching itself to the person of A. B., which he carries with him wherever he goes. But as a marriage once duly contracted in any country will be a valid marriage all the world over, the incapacity to contract a marriage at Rome is as clearly within the prohibitory words of the statute as the incapacity to contract in England. So again, as to the second or annulling branch of the enactment, “ that every marriage without such consent shall be null and void ;” the words employed are general, or, more properly, universal ; and cannot be satisfied in their plain, literal, ordinary meaning, unless they are held to extend to all marriages, in whatever part of the world they may have been contracted or celebrated.

The words of the second section throw light upon and confirm the interpretation to be given to the first. By the second section the descendants of the body of Geo. 2, being above the age of twenty-five years, who shall persist in their resolution to contract a marriage disapproved of or dissented from

by the King, upon giving notice to the Privy Council,
 * 145 are enabled, at * any time from the expiration of twelve calendar months after such notice, to contract such marriage, and such marriage may be duly solemnized, without the previous consent of his Majesty, his heirs or successors ; and such marriage is declared to be good, as if that Act had never been made, unless both Houses of Parliament shall, before the expiration of the said twelve months, expressly declare their disapprobation of such intended marriage. The words employed in this section are the same as in the first, “ to contract a marriage,” and “ marriage ” generally, and without any reference to the country wherein the marriage is contracted or solemnized. But as no doubt could be entertained by any one but that a marriage, taking place with the due observance of the requisites of the second section, would be held equally valid whether contracted and celebrated at

Rome or in England ; so we think it would be contrary to all established rules of construction if the very same words in the first section were to receive a different sense from those in the second ; if it should be held that a marriage at Rome, contracted with reference to the second section, is made valid, and at the same time a marriage at Rome is not prohibited under the first.

Indeed it is scarcely supposable that the legislature should have provided the minute and laborious machinery of the second section ; that it should have interposed such checks against a marriage without consent, and at the same time have rendered such a marriage ultimately valid, in one given state of circumstances ; if the party himself who is the subject of such legislation, by an easy journey, or a voyage of a few hours, could render all these provisions useless, and set the statute at defiance, by contracting * a mar- * 146 riage abroad with whomsoever he thought proper. And it is not unworthy of remark, whilst we are looking to the body of this Act in order to discover its interpretation, that the very exception from the prohibitory clause, of the issue of those princesses who have married or may marry into foreign families, affords some proof that marriages abroad could not have been out of the view or contemplation of the legislature at the time of passing the Act, as such marriages in all probability might not unfrequently be celebrated out of England.

It was contended in the course of the argument at your Lordships' bar, that an Act of the English legislature can have no binding force beyond, or out of, the realm of England ; and if this is meant only, that it can have no obligatory force upon the subjects of another State, the position is no doubt correct in its full extent : but it is equally certain that an Act of the legislature will bind the subjects of this realm, both within the kingdom and without, if such was its intention. Indeed it was admitted by the learned counsel for the claimant, that if there had been found in this statute the words " marriages within the realm of England, or without," or any other words equipollent thereto, under such an enactment the capacity to contract a marriage at Rome would have

been taken away, and the marriage, there solemnized, would have been made null and void. But if the words actually found in the statute are comprehensive enough to include all marriages, as well those within the realm as without, as we think they are; and if, at the same time, the restraining the sense of those words to marriages within England must necessarily defeat the object and purpose of the Act, * 147 as we think it would, then it seems to follow, * that the construction of the Act must be the same, whether those words are found within the statute or not. Surely, if the marriage of a descendant of George 2, contracted or celebrated in Scotland or Ireland, or on the Continent, is to be held a marriage not prohibited by this Act, the statute itself may be considered as virtually and substantially a dead letter from the first day it was passed.

But the object and purpose for which the Act was passed, and the mischief intended to be prevented thereby, are clear, and leave no doubt as to the proper construction of the Act. It was founded upon the policy and expediency which requires that no marriage of any branch of the royal family should be contracted, which might be detrimental to the interests of the state, either at home or abroad. The object declared by the preamble is, "more effectually to guard the descendants of his late Majesty King George 2 from marrying without the approbation of the reigning Sovereign;" it declares "the marriages of the royal family to be of the highest importance to the state;" and "that therefore the Kings of this realm have ever been entrusted with the care and approbation thereof." But this object is frustrated, the mischief is remediless, and the power of the sovereign nugatory, if the marriage, which in England would have been confessedly void, is to be held good and valid when celebrated out of the country.

It was argued on the part of the claimant, that as it is directed in the 1st section of the Act, that the consent under the Great Seal shall be set out in the license and register of the marriage, and as this direction can only be applicable to the case of a marriage celebrated in this country, so the prohibition must be construed as confined to a marriage

in this country * only, and as not extending to a * 148 foreign marriage. But to this objection it appears to us to be a sufficient answer, that the only words in that section that are essential to make the marriage a valid marriage, are those which require “the previous consent of his Majesty, signified under the Great Seal, and declared in Council;” and that the words which follow, directing such consent to be set out in the license and register of the marriage, are, as the very words import, directory only, not essential, and are applicable to those cases alone where they can be applied; namely, to the case of a marriage celebrated in England by license. For it would be impossible to contend, if the marriage of A. B. had been celebrated at Rome, with the previous consent of his Majesty King George 3, signified under the Great Seal, and declared in Council, that such marriage would not have been good and valid to all intents and purposes, although the observance of the direction that such consent should be inserted in the license and register of the marriage, had become, in that case, impracticable.

It was further contended in argument, that inasmuch as by the 3d section of the Act all persons who wilfully and knowingly presume to solemnize, or assist or be present at the celebration of any marriage, or at the making of any matrimonial contract, without such consent, shall incur the penalties of a *præmunire*; and as there is no provision made in this section for the trial and consequently the punishment of the offender where the offence shall be committed out of England, the necessary inference must be, that the statute itself does not extend to prohibit a marriage out of England: but we think the inference that the penal clause is itself defective, in not making provision for the trial of British subjects when they violate the statute out of * the realm, is the more * 149 just and reasonable inference; not that we should refuse, on that account, to give the plain words of the statute their necessary force, and hold the enactment itself to be substantially useless and inoperative.

We therefore think, for the reasons humbly submitted to your Lordships, that the eldest son of A. B., under the circumstances stated in your Lordships’ question, and regard

being had to the Statute 12 Geo. 3, c. 11, could not make out a good title, as heir to A. B., to the lands sought to be recovered.

THE LORD CHANCELLOR. — Your Lordships will, I am sure, agree with me in expressing our thanks to the learned Judges for the care and attention which they have bestowed on this subject, amidst their other incessant and laborious occupations. I think, from the nature of the question, it may be proper that we should postpone the further consideration of this case.

LORD BROUGHAM. — I agree with my noble and learned friend in tendering our thanks to the learned Judges for their most lucid, able, and convincing argument, which the learned Chief Justice has just delivered. I have but one doubt about the postponement, which is on account of putting the parties to the expense of an additional attendance: I am quite prepared to give my opinion on the case at this moment.

THE LORD CHANCELLOR. — I suggested the postponement with a view to consult the wishes of other noble Lords; not from any doubt I entertain, for I entirely concur in the opinion on the statute which has been expressed by the
*150 learned Judges. In fact, I never *entertained any doubt upon the words, the object of the Act, or the provisions of that particular section, the second section, to which the observations of the learned Chief Justice have been directed. The answer which has been given to the question proposed by your Lordships is decisive of the whole case, because the same rule that would apply to estates would apply to honours.

LORD COTTENHAM. — My Lords, I do not apprehend that there is any difference of opinion as to the construction of the Royal Marriage Act; and if so, it would seem to be better to dispose of the case at once. I am of opinion that the marriage is invalid under the statute.

THE LORD CHANCELLOR. — I shall therefore propose to resolve, that it is the opinion of the committee that the claimant has not made out his claim.

LORD BROUGHAM. — My Lords, in agreeing to the motion of my noble and learned friend, and in expressing my entire concurrence with the opinion of the learned Judges, I do so upon the ground, not only that the object of the Act is clear, but that the words of the Act are sufficient (for that is necessary also) to accomplish the manifest purpose of the Act. I say this, because it is not a sufficient ground to hold that the purpose is clear, unless the words are sufficient to accomplish that purpose, though otherwise the Act might have been nugatory. It was so in the case of the General Marriage Act. It was quite clear that that Act was intended to prevent minors from marrying without consent, unless with the publication of banns ; and yet, notwithstanding that, by going to Scotland, — a very short journey, — the parties intended to * be affected by the Act, namely, wealthy * 151 persons, could easily accomplish the purpose, and defeat the Act. My opinion is, that if that Act had used the same phraseology as this, and had rendered the parties incapable of contracting matrimony, we should never have heard of *Compton v. Bearcroft* (a) and *Ilderton v. Ilderton*. (b) At all events, there is sufficient in my mind to stamp with perfect accuracy the opinions delivered by the learned Judges. Parties are rendered incapable of contracting matrimony, and not merely, as in the case of Lord HARDWICKE'S Act, the marriage rendered null and void. It therefore follows that a prince going abroad and contracting matrimony is, for all British purposes, with a view to the Crown and the rights of peerage, incapable of contracting matrimony ; and any marriage so contracted is null and void.

THE LORD CHANCELLOR. — I do not entertain the slightest doubt of the sufficiency of the evidence to establish the marriage as a marriage in fact. (*Vide infra*, p. 153.)

(a) Bull. N. P. 6th ed. 113; 2 Hagg. Cons. Rep. 443, 444 n.

(b) 2 H. Bl. 145.

LORD DENMAN. — After the observations of my noble and learned friends, there does not appear to me to be any sufficient reason for postponing the decision on this claim. I join in the thanks which I think we owe to the learned Judges for the very clear and satisfactory document which has been read before your Lordships, and I am happy and very much satisfied in being enabled to say that my opinion entirely agrees with that of your Lordships; I think the operative words of the Royal Marriage Act, taken alone, are perfectly clear to show that this is no marriage by the law of England.

* 152 * LORD CAMPBELL. — My Lords, I agree with my noble and learned friend, the Lord Chancellor, that, as the evidence now stands, there would be a marriage in fact; because the evidence that has been given to us of the Roman law, uncontradicted as it is, would prove that a marriage at Rome of English Protestants, contracted according to the rites of their own church, would be recognized as a marriage by the Roman law, and therefore would be a marriage all over the world. I own that that evidence rather surprised me. I had imagined that it was impossible there could be a valid marriage at Rome, between Protestants, by a Protestant clergyman, such as the Roman law would recognize. As the evidence stands at your Lordships' bar, it would appear, however, that the Roman law would recognize such a marriage without the religious ceremonies required by the Romish church before the Council of Trent; namely, without the intervention of a priest, and would treat it as a marriage valid by the universal law of the church before the date of the decree of that Council; and it would appear that the decree of the Council of Trent respecting marriages was not meant to apply to the marriage of Protestants, who could not conform to it. That, my Lords, I think is the universally prevailing opinion. But when we come to the Royal Marriage Act, it seems to me that there is an insuperable bar to the validity of this marriage. The elaborate opinion that has been delivered by the Lord Chief Justice of the Common Pleas appears to me to have entirely exhausted this part of the subject. It accords with the opinion I had originally

formed. I kept my mind, however, entirely open till I had heard the arguments on both sides, and I now am confirmed in my previous opinion by the legal reasoning laid before us in the most admirable opinion * we have * 153 this day heard delivered by the Lord Chief Justice. I entirely concur with that opinion. I have no doubt that it is competent to the British legislature to pass a law making invalid the marriage of particular British subjects all over the world. I have no doubt that it was the object of that Act of Parliament to invalidate marriages of the descendants of George 2 (with the exception of princesses married into foreign royal families), without the consent of the Crown, wherever those marriages might be celebrated; and I am clearly of opinion that the intention is sufficiently testified by the language which has been employed.

THE LORD CHANCELLOR. — My Lords, I wish to explain that by a “marriage in fact” I mean that I think the evidence is sufficient to show that these parties were married at Rome by a clergyman of the Church of England, in conformity with the rites and ceremonies of the English church. With regard to the evidence, as referred to by my noble and learned friend (Lord CAMPBELL), that evidence is sufficient, as it at present stands, to show that this marriage would be a valid marriage of Protestants at Rome, according to the law of Rome: whether such a marriage would be a valid marriage in this country for any purpose independently of the Royal Marriage Act, is a point upon which I give no opinion.

LORD BROUGHAM. — I give no opinion upon that.

LORD COTTENHAM. — My Lords, after the discussion which has taken place, I think it right to say that my opinion is formed entirely and exclusively upon the Royal Marriage Act. It is only that part of the case which has been concluded, and that is the only part * upon which we * 154 can properly express an opinion. I entirely agree in the opinion which has been expressed by the learned Judges,

inasmuch as by the construction of the Royal Marriage Act, whether the marriage would be valid by the law of Rome or not, it would not be valid by the law of this country. My opinion, therefore, is against the claim.

It was then resolved that the claimant had not made out his claim to be Duke of Sussex, Earl of Inverness, and Baron of Arklow; and the chairman was directed to report the same to the House.

The resolution was accordingly reported to the House, and affirmed. And the same was reported by the House to her Majesty. — *Lords' Journals*, 9th July, 1844.

[134]

* O'CONNELL AND OTHERS v. THE QUEEN. * 155

1844.

DANIEL O'CONNELL, JOHN O'CONNELL, THOMAS MATTHEW RAY, THOMAS STEELE, CHARLES GAVAN DUFFY, JOHN GRAY, and RICHARD BARRETT	}	<i>Plaintiffs in Error.</i>
HER MAJESTY THE QUEEN <i>Defendant in Error.</i>		

*Criminal Pleading. Indictment. Witnesses before Grand Jury.
Continuances. Challenge to the Array. Findings. Judgment.
Recognizances. Practice. Arrest of Judgment. Error.*

A general judgment for the Crown, on an indictment containing several counts, one of which is bad, and where the punishment is not fixed by law, cannot be supported.¹

A good finding on a bad count, and a bad finding on a good count, stand on the same footing ; both being nullities.

Where a count in an indictment contains only one charge against several defendants, the jury cannot find any one of the defendants guilty of more than one charge.

¹ In Massachusetts, where a general verdict of guilty is rendered upon an indictment, in which one count is good and sufficient to warrant the judgment given, it is not a cause for reversing the judgment on error, that there is another count which is defective. *Jennings v. Commonwealth*, 17 Pick. 80 ; *Brown v. Commonwealth*, 8 Mass. 59 ; *Commonwealth v. Hawkins*, 3 Gray, 463 ; *Commonwealth v. Howe*, 13 Gray, 26 ; *Commonwealth v. Nickerson*, 5 Allen, 518. Such is generally the American doctrine. See *Brown v. State*, 5 Eng. 607 ; *Parker v. Commonwealth*, 8 B. Mon. 30 ; *State v. Shelledy*, 8 Iowa, 477 ; *Hudson v. State*, 34 Ala. 253 ; *State v. Montgomery*, 28 Missou. 594 ; *State v. Bean*, 21 Missou. 269 ; *State v. Jennings*, 18 Missou. 435 ; *State v. Burke*, 38 Maine, 574 ; *People v. Curling*, 1 John. 320 ; *Guenther v. People*, 24 N. Y. 100 ; *State v. Stebbins*, 29 Conn. 463 ; *State v. Bean*, 19 Vt. 530 ; *Hazen v. Commonwealth*, 23 Penn. St. 355 ; *United States v. Burns*, 5 McLean, 23 ; *People v. Wilkinson*, 4 Parker C. C. 26 ; *Roberts v. State*, 14 Geo. 8 ; *Bullock v. State*, 10 Geo. 47 ; *State v. Miller*, 7 Ired. 275 ; *State v. Pace*, 9 Rich. 355 ; *West v. State*, 2 Zabr. 212.

Where, therefore, a count in an indictment charged several defendants with conspiring together to do several illegal acts, and the jury found one of them guilty of conspiring with some of the defendants to do one of the acts, and guilty of conspiring with others of the defendants to do another of the acts, such finding is bad, as amounting to a finding that one defendant was guilty of two conspiracies, though the count charged only one.

An indictment against different defendants consisted of several counts charging them with various illegal acts. Some of the counts were bad, and on some of the good counts there were bad findings. The judgment against each of the defendants was stated to be in respect of "his offences aforesaid."

Held, that each count must be considered as charging a separate offence, and that the expression "his offences aforesaid" must be treated as extending to all the offences of which each defendant had been found guilty; and as some of the counts and some of the findings were bad, such judgment could not be supported.

Upon a count in an indictment against eight defendants, charging one conspiracy to effect certain objects, a finding that three of the defendants are guilty generally, that four of them are guilty of conspiring to effect some, and not guilty as to the residue of these objects, is bad in law, and repugnant; inasmuch as the finding that the three were guilty, was a finding that they were guilty of conspiring with the other five to effect all the objects of the conspiracy; whereas, by the same finding, it appears that the other five were guilty of conspiring to effect only some of those objects.

A count charging defendants with conspiring "to cause and procure divers subjects to meet together in large numbers for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such meetings, changes in the government, laws, and constitution of the realm," is bad: first, because "intimi-

* 156 dation" is not a technical word having a necessary * meaning in a bad sense; and, secondly, because it is not distinctly shown what species of intimidation is intended to be produced, or on whom it is intended to operate.

A plea in abatement is a dilatory plea, and must be pleaded with strict exactness. Where, therefore, defendants in an indictment in the Court of Queen's Bench in Dublin, pleaded in abatement, that the indictment was found on the evidence of witnesses who had not been sworn in open Court, according to the Act 56 Geo. 3, c. 87; but did not set out in the plea the names of those witnesses, nor allege that there were no other witnesses duly sworn on whose evidence the indictment was found, nor allege that the witnesses on whose evidence it was found, were not affirmed, the plea was held bad.

And for the same reasons, a plea in abatement on the ground that the

swearing of the witnesses had not been duly certified by the signature of the foreman or other member of the grand jury, under the 1 & 2 Vict. c. 37, was held bad.

The 56 Geo. 3, c. 87, is repealed by the 1 & 2 Vict., c. 37; and this latter Act applies to the Court of Queen's Bench, as well as to the Courts of Assize and Quarter Sessions, in Ireland.

A challenge to the array in the Court of Queen's Bench in Dublin, alleged that the jurors' book had not been completed in conformity with the requisites of the Act 3 & 4 Will. 4, c. 9; that the names of fifty-nine persons, duly qualified to serve on juries, had been fraudulently omitted from the general list from which the book was made up, and from the book itself, for the purpose of prejudicing the defendants; but the challenge did not contain any specific accusation against the sheriff or other returning officer concerned in preparing the list. *Quære*. Whether the causes of challenge to the array, thus alleged, were sufficient? — Per Lord DENMAN: They were sufficient.

The Court of Queen's Bench in Dublin, in Hilary Term, made an order for a trial at bar in that term; and another order, declaring that, in case the trial should not terminate before the end of the term, the next and every succeeding day until the first day of the following term, or so many days as should be necessary, should be appointed for the continuation of such trial; and that every day so appointed should be deemed a part of Hilary Term.

Held, that this order was properly made under the authority of the 1 & 2 Will. 4, c. 31, § 3; and had the effect of duly continuing the trial during the days appointed.

After that order, which was entered on the record, a continuance was also entered from the day in vacation on which the verdict was found, until the following term. *Held*, that there was no discontinuance.

Quære. Whether a judgment which directs that each of several defendants shall enter into recognizances to keep the peace, &c., "for the space of seven years next ensuing the acknowledgment thereof," is good, as no period is fixed for entering into the recognizances.

Several defendants, charged in one indictment with different illegal acts, severed in their defence; and being convicted and sentenced to different punishments, brought separate writs of error. *Held*, that they were entitled to appear by several counsel, and that such counsel were severally entitled to reply.

The counsel for the Crown, where the Crown is the defendant in a writ of error, is not necessarily entitled to the final rely, though the Crown is the real litigant party.

July 4, 5, 6, 8, 9, 10; September 2, 4, 1844.

* THIS was a writ of error, brought upon a judgment of the Court of Queen's Bench in Ireland. The defendants in the Court below had been indicted for a con-

* 157

spiracy. The caption and indictment were in the following form : —

“ Pleas before the Queen at Dublin, of Michaelmas Term, in the seventh year, &c.

“ COUNTY OF THE CITY OF DUBLIN, to wit :

“ Be it remembered, that on Thursday, the 2d day of November, in the same term, in the Court of our Lady the Queen, before the Queen herself, at Dublin, in the county of the city of Dublin, upon the oath and affirmation of twelve good and lawful men of the body of the county of the city of Dublin, now here sworn, affirmed, and charged to inquire for our said Lady the Queen, and for the body of the said county of the city of Dublin, it is presented as follows, that is to say —

“ COUNTY OF THE CITY OF DUBLIN, to wit :

“ The jurors for our Lady the Queen, upon their oath and affirmation present and say, that Daniel O’Connell, of &c., John O’Connell, Thomas Steele, Thomas Matthew Ray, Charles Gavan Duffy, the Rev. Thomas Tierney, Clerk, the Rev. Peter James Tyrrell, and Richard Barrett, of &c., unlawfully, maliciously, and seditiously contriving, intending, and devising to raise and create discontent and disaffection amongst the liege subjects of our said Lady the Queen, and to excite the said liege subjects to hatred and contempt of the government and constitution of this realm as by law established, and to excite hatred, jealousies, and ill-will amongst different classes of the said subjects, and to
 * 158 create discontent and disaffection amongst divers of the said * subjects, and amongst others, her Majesty’s subjects serving in her Majesty’s army ; and further contriving, intending, and devising to bring into disrepute, and to diminish the confidence of her Majesty’s subjects in the tribunals duly and lawfully constituted for the administration of justice ; and further unlawfully, maliciously, and seditiously contriving, intending, and devising, by means of intimidation and the demonstration of great physical force,

to procure and effect changes to be made in the government, laws, and constitution of this realm as by law established; heretofore, to wit, on the 13th of February, A.D. 1843, with force and arms, to wit, at the parish of Saint Mark, in the county of the city of Dublin, unlawfully, maliciously, and seditiously did combine, conspire, confederate, and agree with each other, and with divers other persons whose names are to the jurors aforesaid unknown, to raise and create discontent and disaffection amongst the liege subjects of our said Lady the Queen, and to excite such subjects to hatred and contempt of the government and constitution of this realm as by law established, and to unlawful and seditious opposition to the said government and constitution; and also to stir up jealousies, hatred, and ill-will between different classes of her Majesty's subjects, and especially to promote amongst her Majesty's subjects in Ireland feelings of ill-will and hostility towards and against her Majesty's subjects in the other parts of the United Kingdom of Great Britain and Ireland, and especially in that part of the said United Kingdom called England; and further to excite discontent and disaffection amongst divers of her Majesty's subjects serving in her said Majesty's army; and further to cause and procure, and aid and assist in causing and procuring divers subjects * of our said Lady the Queen, unlawfully, mali- * 159 ciously, and seditiously to meet and assemble together in large numbers, at various times, and at different places within Ireland, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such assemblies and meetings, changes and alterations in the government, laws, and constitution of this realm as by law established; and further to bring into hatred and disrepute the Courts by law established in Ireland for the administration of justice, and to diminish the confidence of her said Majesty's liege subjects in Ireland in the administration of the law therein, with the intent to induce her Majesty's subjects to withdraw the adjudication of their differences with and claims upon each other from the cognizance of the said Courts by law established, and to submit the

same to the judgment and determination of other tribunals, to be constituted and contrived for that purpose."

The count then went on to state at full length the various acts which were alleged as overt acts in support of the charge of conspiracy. These overt acts were alleged to be done in order "to excite the liege subjects of our Lady the Queen to discontent with, and hatred of, and disaffection to, the government, laws, and constitution of this realm as by law established, in contempt of our said Lady the Queen, and the laws of this realm, to the evil example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity."

2d Count. — The second count was in exactly the same terms as the first, but omitted to allege any overt acts.

* 160 * The third count was in the following form: —

3d Count. — That the said defendants, unlawfully, maliciously, and seditiously contriving, &c., to raise and create discontent and disaffection amongst the liege subjects of the Queen, and to excite the said liege subjects to hatred and contempt of the government and constitution of this realm as by law established, and to excite hatred, jealousies, and ill-will amongst different classes of the said subjects, and to create discontent and disaffection amongst divers of the said subjects, and amongst others, her Majesty's subjects serving in her Majesty's army; and further contriving, intending, and devising to bring into disrepute, and to diminish the confidence of her Majesty's subjects in the tribunals duly and lawfully constituted for the administration of justice; and further unlawfully, maliciously, and seditiously contriving, intending, and devising, by means of intimidation and the demonstration of great physical force, to procure and effect changes to be made in the government, laws, and constitution of this realm as by law established; heretofore, to wit, on the 13th of February, A. D. 1843, with force and arms, to wit, at, &c., aforesaid, unlawfully, maliciously, and seditiously did combine, conspire, confederate, and agree with each other, and with divers other persons whose names are to the jurors aforesaid unknown, to raise and create discontent and disaffection amongst the liege subjects of our said Lady

the Queen, and to excite such subjects to hatred and contempt of the government and constitution of this realm as by law established, and to unlawful and seditious opposition to the said government and constitution, and also to stir up hatred, jealousies, and ill-will between different classes of her Majesty's subjects, and especially to promote amongst * her Majesty's subjects in Ireland feelings * 161 of ill-will and hostility towards and against her Majesty's subjects in the other parts of the said United Kingdom, and especially in that part of the said United Kingdom called England; and further to excite discontent and disaffection amongst divers of her Majesty's subjects serving in her said Majesty's army; and further to cause and procure, and aid and assist in causing and procuring divers subjects of our said Lady the Queen to meet and assemble together in large numbers at various times and in different places within Ireland, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such assemblies and meetings, changes and alterations in the government, laws, and constitution of this realm, as by law established; and further to bring into hatred and disrepute the Courts by law established in Ireland for the administration of justice, and to diminish the confidence of her said Majesty's liege subjects in Ireland in the administration of the law therein, with the intent to induce her Majesty's subjects to withdraw the adjudication of their differences with and claims upon each other from the cognizance of the said Courts by law established, and to submit the same to the judgment and determination of other tribunals, to be constituted and contrived for that purpose, in contempt, &c.

The 4th count was the same as the third, omitting the charges as to creating discontent and disaffection among the subjects serving in the army, and as to the diminishing the confidence of the people in the tribunals established by law, and procuring them to withdraw the cognizance of their differences from such tribunals.

* 5th Count. — That the said defendants, unlaw- * 162 fully, seditiously, &c., intending to cause and create

discontent and disaffection amongst the liege subjects of our said Lady the Queen, and to excite the said subjects to hatred and contempt of the government and constitution of this realm as by law established, unlawfully, maliciously, and seditiously did combine, conspire, confederate, and agree with each other and with divers other persons whose names are unknown, to raise and create discontent and disaffection amongst the liege subjects of our said Lady the Queen, and to excite the said subjects to hatred and contempt of the government and constitution of this realm as by law established, and to unlawful and seditious opposition to the said government and constitution, and also to stir up jealousies, hatred, and ill-will between different classes of her Majesty's subjects, and especially to promote amongst her Majesty's subjects in Ireland feelings of ill-will and hostility towards and against her Majesty's subjects in the other parts of the said United Kingdom, and especially in that part of the said United Kingdom called England, in contempt, &c.

6th Count. — That the said defendants, unlawfully, maliciously, and seditiously contriving, intending, and devising, by means of intimidation and the demonstration of great physical force, to procure and effect changes to be made in the government, laws, and constitution of this realm as by law established; heretofore, to wit, on the 13th February, A. D. 1843, with force and arms, to wit, &c., aforesaid, unlawfully, maliciously, and seditiously did combine, conspire, confederate, and agree with each other, and with divers other persons whose names are to the jurors aforesaid unknown, to cause and procure, and aid and assist in

* 163 * causing and procuring, divers subjects of our said Lady the Queen to meet and assemble together in large numbers at various times and at different places within Ireland, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of the great physical force at such assemblies and meetings, changes and alterations in the government, laws, and constitution of this realm as by law established, in contempt, &c.

The 7th count was the same as the 6th, with the addition

of these words: "And especially, by the means aforesaid, to bring about and accomplish a dissolution of the Legislative Union now subsisting between Great Britain and Ireland, in contempt," &c.

8th Count. — That the said defendants, unlawfully and seditiously intending, &c., to bring into disrepute and to diminish the confidence of her Majesty's subjects in the tribunals duly and lawfully constituted in Ireland for the administration of justice; on, &c., with force, &c., at, &c., unlawfully, maliciously, and seditiously did combine, conspire, confederate, and agree with each other and with divers other persons whose names are to the jurors unknown, to bring into hatred and disrepute the tribunals by law established in Ireland for the administration of justice, and to diminish the confidence of her said Majesty's liege subjects in Ireland in the administration of the law therein, with the intent to induce her Majesty's subjects to withdraw the adjudication of their differences with and claims upon each other from the cognizance of the said tribunals by law established, and to submit the same to the judgment and determination of other tribunals to be constituted and contrived for that purpose, in contempt, &c.

* The 9th count was the same as the 8th, omitting * 164 from the introductory part the words "in Ireland," after the words "duly and lawfully constituted;" and in the last part of the count, after the words "administration of the law therein," omitting the allegation as to withdrawing the adjudication of differences, and substituting the following: "and to assume and usurp the prerogative of the Crown in the establishment of Courts for the administration of the law, in contempt," &c.

The 10th count was the same as the 8th in the introductory part, but the charge was in general terms, that the defendants unlawfully, maliciously, and seditiously did combine, conspire, confederate, and agree with each other and with divers other persons whose names are unknown, to bring into hatred and disrepute the tribunals by law established in Ireland for the administration of justice, and to diminish the confidence of

her Majesty's liege subjects in Ireland in the administration of the laws therein, in contempt, &c.

11th Count. — That the said defendants, unlawfully, &c., intending, &c., by means of intimidation and the demonstration of physical force, and by causing and procuring large numbers of persons to meet and assemble together in divers places and at divers times within Ireland, and by means of seditious and inflammatory speeches and addresses to be made and delivered to the said persons so to be assembled, and also by means of publishing, &c., to the subjects of her said Majesty divers unlawful and seditious writings; and further intending, by the several means aforesaid, to intimidate the Lords Spiritual and Temporal and the Commons of the Parliament of the United Kingdom of Great Britain

* 165 and Ireland, and * thereby to effect and bring about changes in the laws and constitution of this realm as by law established; heretofore, to wit, on the 13th February, A.D., 1843, to wit, at, &c., aforesaid, unlawfully and seditiously did combine, &c., with each other and with other persons whose names are unknown, to cause large numbers of persons to meet together in divers places and at divers times within Ireland, and by means of seditious speeches, &c., to be made and delivered at the said places and times respectively, and also by means of the publishing to the subjects of her said Majesty divers unlawful, malicious, and seditious writings and compositions, to intimidate the Lords Spiritual and Temporal and the Commons of the Parliament of the United Kingdom of Great Britain and Ireland, and thereby to effect and bring about changes and alterations in the laws and constitution of this realm as now by law established, in contempt, &c.

To this indictment the plaintiffs in error severally pleaded in abatement, that the bill of indictment was found a true bill upon the evidence of divers, to wit, four witnesses produced before and examined by the jurors aforesaid; and that the said witnesses were not, nor was any one of them, previously to their being so examined by the jurors aforesaid, sworn in the said Court of our Lady the Queen, before the

Queen herself, according to the provisions of the 56 Geo. 3, c. 87, § 1.

To these pleas the Attorney-General demurred, and the plaintiffs in error joined in demurrer. The question raised by the demurrer was argued in the same term, and the demurrer was allowed by the Court, and judgment given that each of the parties should answer over to the indictment; whereupon they severally * pleaded not guilty, * 166 and jury process issued for the trial on the 15th January, 1844. (a)

By an order of the Court, dated in Hilary term, 1844, it was ordered that the issues joined in this case be tried at the bar of the Court; and afterwards, in the same term, the following order was made: "It is ordered and directed, according to the form of the statute in that case made and provided, that in case the trial in this cause, so fixed as aforesaid for the 15th day of January in this same term, should not terminate on or before the 31st day of January, being the last day of same Hilary term, then that Thursday, the 1st day of February next, and every succeeding day until the 15th day of April next, or so many days thereof as shall be necessary for that purpose, be appointed for the continuation of the said trial, and that the days so fixed shall accordingly, for the purpose of such trial, be and be deemed and taken to be a part of this same Hilary term."

On Monday the 15th January, 1844, the trial having been called on, the defendants severally challenged the array of the jury panel.

The challenge of the defendant, Daniel O'Connell, was as follows: "And the said Daniel O'Connell thereupon in his own proper person challenges the array of the said panel, because he says that at the special sessions heretofore holden in and for the county of the city of Dublin on the 14th November, 1843, before the Rt. Hon. Frederick Shaw, recorder of the said city, for the purpose of examining the list of jurors for the said city for the now current year 1844, pur-

(a) See the report of this case in the Court of Queen's Bench, Ireland, by John Simson Armstrong and Edward Shirley Trevor, Esqrs., Barristers-at-Law.

suant to the statutable enactments in such case made
 * 167 and provided, the clerks of the peace in and for * the
 said city, duly laid before the recorder divers, to wit,
 twenty lists theretofore duly furnished to the clerks of the
 peace by the several collectors of grand jury cess within the
 city, in that behalf duly authorized to make such lists, con-
 taining, or purporting to contain, a true list of every man
 residing within their respective districts of collection who
 was qualified and liable to serve on juries, pursuant to the
 statutes in such case made and provided, with the Christian
 and surname of each written at full length, and with the
 true place of abode, the title, quality, calling or business, and
 the nature of the qualification of every such man, in their
 own proper columns, pursuant to the statutable enactments in
 such case made and provided: and that the said several lists
 respectively were at the special sessions duly corrected, al-
 lowed, and signed by the said recorder, pursuant, &c. ; and
 that the several persons whose names are herein after men-
 tioned were then and there adjudged by the recorder to have
 the qualifications herein after named, and that the names of
 the several persons were then and there contained in the
 said several lists so corrected, allowed, and signed as afore-
 said; but that the recorder did not, as by the said statutable
 enactments is directed, cause to be made out from the said
 several last mentioned lists one general list, containing the
 names of all persons whose qualifications had been so allowed,
 arranged according to rank and property; nor did the re-
 corder thereupon, or at all, deliver such general list contain-
 ing such names to the clerks of the peace, to be fairly copied
 by the said clerks of the peace in the same order, as by the
 said statutable enactments is directed, but on the contrary
 thereof omitted so to do; and that a certain paper writing,
 purporting to be a general list purporting to be made
 * 168 out from such several * lists so corrected, allowed, and
 signed as aforesaid, was illegally and fraudulently
 made out by some person or persons unknown; and that the
 said paper writing purporting to be such general list as afore-
 said did not contain the names of all the persons whose
 qualifications had been allowed upon the correcting, allowing,

and signing of said lists as aforesaid by the recorder, but omitted the names of divers, to wit, fifty-nine persons, whose qualifications to be on said list respectively had been so allowed as aforesaid by the recorder ; which said several persons whose names were so omitted are as follows, that is to say (here followed fifty-nine names, with their places of abode). And the said Daniel O'Connell further says, that the several persons whose names were so omitted from the fraudulent paper writing purporting to be the general list, were, at the time of the return of the collectors' lists, and at the time of the special sessions, and still are, severally resident within the said city, and were at the several times, and now are, duly qualified to be, and should and ought to have been placed upon the general list ; and that from the fraudulent paper writing purporting to be such general list as aforesaid, a certain book, purporting to be the jurors' book of the said city for the current calendar year 1844, was made up and framed ; and that from the book so purporting to be the jurors' book of the said city for the current year, was made up the special jurors' list for the said current year ; and that the several persons whose names were so omitted from the fraudulent paper writing purporting to be such general list, were also omitted from the book purporting to be the jurors' book, and from the list purporting to be the special jurors' list : and that the several persons so omitted as aforesaid have been duly adjudged and * allowed by the said recorder * 169 at the special sessions to be persons having the qualification qualifying and entitling them, and each of them respectively, to be upon the jurors' book, and also to be upon the special jurors' list for the current year 1844. And the said Daniel O'Connell further saith, that the panel aforesaid made and returned to try the issue in this cause between the Crown and the said Daniel O'Connell, is arrayed and constructed from the list purporting to be the special jurors' list for the year 1844, so made out as aforesaid, to the manifest wrong and injury of the said Daniel O'Connell : and he further says that the fraudulent omission of the several persons' names from the paper writing purporting to be such general list as aforesaid was without the knowledge, consent, privity,

contrivance, suggestion, or sanction of the said Daniel O'Connell, or of any person or persons acting for him or with him, or with his privity, or in any way whatsoever by his authority or on his behalf, or with his privity; and that the panel was so arrayed as aforesaid from the paper writing purporting to be such special jurors' list, without the consent and against the protest and will of the said Daniel O'Connell; and that the clerk of the Crown for the city of Dublin, and the Crown solicitor acting for the Crown in this prosecution, had due notice of the premises before the said panel was so arrayed: "— verification.

The challenges of the other defendants were in the same terms, except that of the defendant Thomas Steele, which imputed "that the general list was illegally and fraudulently made out for the purpose and with the intent of prejudicing the said T. S. in this cause, by some person or persons unknown."

The Attorney-General demurred to all these challenges, as insufficient in law. The defendants joined in
* 170 * demurrer. The demurrers were allowed, and thereupon the jury was sworn.

The trial was duly continued to the 31st of January, and upon that day the following entry was made upon the record: "And now at this day, that is to say, on the said 31st day of January, forasmuch as it appears to the Court here that the trial of the said issues, so joined as aforesaid, is not, nor can the said trial thereof be concluded on this same day, it is ordered by the said Court here that the said jurors so impanelled and sworn to try the said issues, shall have leave to withdraw this same day from the bar of this Court here, and that the said jurors shall again come to the bar of this same Court here on the morrow, that is to say, on the 1st day of February next, at the hour of ten o'clock in the forenoon; and that the said defendants do again appear at the bar of this Court at that time, in order that the said trial may be continued." On the 1st of February this continuance was entered: "And now at this day, that is to say, on the said 1st day of February, at the hour aforesaid, the said Attorney-General for our said Lady the Queen comes into Court here, and the said defendants appear at the bar of the said Court

here, as in that behalf directed aforesaid. And the said jurors so impanelled and sworn aforesaid also come, and the said trial of the said issues is thereupon continued for a certain time, the same being necessary for the purpose thereof, that is to say, until and upon Monday, 12th February, A.D. 1844."

On Monday, 12th February, the jurors delivered in the following findings: The jurors ^{Findings on the 1st and 2d counts.} say, that as to the premises in the said first and second counts of the said indictment respectively charged as aforesaid, the said Daniel O'Connell, John O'Connell, Thomas Steele, Thomas Matthew Ray, Charles Gavan Duffy, * the Rev. Thomas Tierney, John Gray, and Richard * 171 Barrett, are and each of them is guilty of so much thereof as charges them for that they, unlawfully, maliciously, and seditiously contriving, intending, and devising to raise and create discontent and disaffection amongst the liege subjects of our said Lady the Queen, and to excite the said liege subjects to hatred and contempt of the government and constitution of this realm as by law established, and to excite hatred, jealousies, and ill-will amongst different classes of the said subjects, did unlawfully, maliciously, and seditiously combine, conspire, confederate, and agree with each other, and with divers other persons whose names are to the jurors unknown, to raise and create discontent and disaffection amongst the liege subjects of our said Lady the Queen, and to excite such subjects to hatred and contempt of the government and constitution of this realm as by law established, and to unlawful and seditious opposition to the said government and constitution, and also to stir up jealousies, hatred, and ill-will between different classes of her Majesty's subjects, and especially to promote amongst her Majesty's subjects in Ireland feelings of ill-will and hostility towards and against her Majesty's subjects in the other parts of Great Britain and Ireland, and especially in that part of the said United Kingdom called England, in the said first and second counts of the said indictment respectively charged as aforesaid, in manner and form as therein is so above charged as aforesaid; and as to the residue of the said premises in the said first and second counts of the said indictment respectively charged as

aforesaid, the said jurors upon their oath aforesaid say that the said Thomas Tierney is not guilty thereof. The jurors

say that Daniel O'Connell, John O'Connell, Thomas

* 172 Steele, Thomas M. Ray, Charles Gavan * Duffy, John

Gray, and Richard Barrett, are and each of them is guilty of so much of the said residue as charges them for that they, unlawfully, maliciously, and seditiously intending as aforesaid, and further unlawfully, maliciously, and seditiously contriving, intending, and devising to bring into disrepute, and to diminish the confidence of her Majesty's subjects in the tribunals duly and lawfully constituted for the administration of justice, and further contriving, intending, and devising, by means of intimidation and the demonstration of great physical force, to procure and effect changes to be made in the government, laws, and constitution of this realm as by law established, did unlawfully, maliciously, and seditiously combine, conspire, confederate, and agree with each other and with divers other persons whose names are to the jurors unknown, to cause and procure divers subjects of the Queen to meet and assemble together in large numbers, at various times and in different places within Ireland, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such assemblies and meetings, changes and alterations in the government, laws, and constitution of this realm as by law established; and further to bring into hatred and disrepute the Courts by law established in Ireland for the administration of justice, and to diminish the confidence of her said Majesty's liege subjects in Ireland in the administration of the law therein, with the intent to induce her Majesty's subjects to withdraw the adjudication of their differences with and claims upon each other from the cognizance of the said Courts by law established, and to submit the same to the judgment and determination of other tribunals, to be constituted and

* 173 contrived for that purpose, — * in the said residue of

the said first and second counts of the said indictment respectively charged as aforesaid, in manner and form as therein is so above charged; and as to the remainder of the

said residue of the said premises in the said first and second counts of the said indictment respectively therein charged as aforesaid, the jurors say, that John O'Connell, Thomas Steele, Thomas M. Ray, and John Gray, are not nor is any of them guilty thereof. And the jurors further say, that Daniel O'Connell, Richard Barrett, and Charles Gavan Duffy, are and each of them is guilty of so much of the said remainder of the said residue as charges them for that they, unlawfully, maliciously, and seditiously intending to create discontent and disaffection amongst divers of the said subjects, and amongst others her Majesty's subjects serving in her Majesty's army, did unlawfully combine and conspire with each other, and with divers other persons whose names are to the jurors unknown, to excite discontent and disaffection amongst divers of her Majesty's subjects serving in her Majesty's army, — in the said remainder of the said residue so charged as aforesaid, in manner and form as therein is so above charged: and as to other the premises in the said remainder of the said residue charged as aforesaid, the jurors further say, that Daniel O'Connell, Richard Barrett, and Charles G. Duffy, are not, nor is any of them, guilty thereof. And as to the premises in the third count of the indictment so charged as aforesaid, the jurors say that ^{Findings on the 3d count.}

Daniel O'Connell, Richard Barrett, and Charles Gavan Duffy, are, and each of them is, guilty thereof in manner and form as therein in that behalf against them, Daniel O'Connell, Richard Barrett, and Charles Gavan Duffy, charged as aforesaid. And the jurors further say, that John O'Connell, Thomas Steele, * Thomas Matthew Ray, and * 174 John Gray, are, and each of them is, guilty of the premises in the third count of the indictment charged against them, John O'Connell, Thomas Steele, Thomas M. Ray, and John Gray, in manner and form as therein is so above charged against them as aforesaid, save and except as to so much of the premises in the third count as charges them, the said John O'Connell, Thomas Steele, T. M. Ray, and John Gray, with the unlawfully, maliciously, and seditiously conspiring to excite discontent and disaffection amongst divers of her Majesty's subjects serving in her said Majesty's army; and as

to the last mentioned part of the premises in the third count of the indictment, and so excepted as last aforesaid, the jurors say that they, John O'Connell, Thomas Steele, Thomas M. Ray, and John Gray, are not, nor is any of them, guilty thereof. And the jurors further say, that Thomas Tierney is guilty of so much of the premises in the said third count as charges him, for that he, unlawfully, maliciously, and seditiously contriving, intending, and devising to raise discontent and disaffection amongst the liege subjects of the Queen, and to excite the liege subjects to hatred and contempt of the government and constitution of this realm as by law established, and to excite hatred, jealousies, and ill-will amongst different classes of the subjects, did unlawfully, maliciously, and seditiously conspire, &c., with Daniel O'Connell, Richard Barrett, Charles Gavan Duffy, John O'Connell, Thomas Steele, Thomas M. Ray, and John Gray, and divers other persons unknown, to raise and create discontent and disaffection amongst the liege subjects of the Queen, and to excite such subjects to hatred and contempt of the government and constitution of this realm as by law established, and to unlawful and sedi-

* 175 tious * opposition to the government and constitution, and also to stir up hatred, jealousies, and ill-will between different classes of her Majesty's subjects, and especially to promote amongst her Majesty's subjects in Ireland feelings of ill-will and hostility towards and against her Majesty's subjects in other parts of the United Kingdom, and especially in England, in the third count of the said indictment above charged against him Thomas Tierney, in manner and form as therein is so above charged against him; and as to the residue of the premises in the third count of the said indictment against him Thomas Tierney so charged, the jurors say that the said Thomas Tierney is not guilty thereof. And

Findings on the 4th count. as to the premises in the fourth count of the indictment so charged as aforesaid, the jurors say that they, Daniel O'Connell, Richard Barrett, Charles Gavan Duffy, John O'Connell, Thomas Steele, T. M. Ray, and John Gray, are, and each of them is, guilty thereof, in manner and form as therein in that behalf is charged against them as aforesaid; and the jurors further say that Thomas

Tierney is guilty of so much of the premises in the fourth count as charges him Thomas Tierney, for that he, unlawfully, maliciously, and seditiously contriving, intending, and devising to raise and create discontent and disaffection amongst the liege subjects of the Queen, and to excite them to hatred and contempt of the government and constitution of this realm as by law established, and to excite jealousies and ill-will amongst different classes of the said subjects, did unlawfully, maliciously, and seditiously conspire, &c., with Daniel O'Connell, Richard Barrett, Charles Gavan Duffy, John O'Connell, Thomas Steele, Thomas Matthew Ray, and John Gray, and divers other persons unknown, to raise and create discontent and disaffection amongst * the liege * 176 subjects of the Queen, and to excite such subjects to hatred and contempt of the government and constitution of this realm as by law established, and to unlawful and seditious opposition to the said government and constitution, and also to stir up hatred, jealousies, and ill-will between different classes of her Majesty's subjects, and especially to promote amongst her Majesty's subjects in Ireland feelings of ill-will and hostility towards and against her Majesty's subjects in other parts of the said United Kingdom, and especially in England, in the fourth count of the indictment above charged against him Thomas Tierney, in manner and form as therein is so above charged against him. And as to the residue of the premises in the fourth count of the said indictment against him Thomas Tierney so charged as aforesaid, the jurors say that he is not guilty thereof. And as to the premises in said fifth count of the said indictment so charged as aforesaid, the said jurors upon their oath say as ^{Findings on the 5th count.} aforesaid, that Daniel O'Connell, John O'Connell, Thomas Steele, Thomas Matthew Ray, Charles Gavan Duffy, John Gray, Richard Barrett, Thomas Tierney, are, and each of them is, guilty thereof, in manner and form as therein is so above charged against them. And as to the premises in the several other counts of the indictment, so therein ^{Findings on the remaining counts.} respectively charged as aforesaid, that is to say, the 6th, 7th, 8th, 9th, 10th, and 11th counts respectively, the jurors say that they, Daniel O'Connell, John O'Connell,

Thomas Steele, Thomas Matthew Ray, Charles Gavan Duffy, John Gray, and Richard Barrett, are, and each of them is, guilty thereof, in manner and form as therein so above charged against them as aforesaid. And the jurors further and lastly say, that Thomas Tierney is not guilty of the premises in the last mentioned counts of the indictment, that *177 *is to say, the 6th, 7th, 8th, 9th, 10th, and 11th counts thereof, in manner and form as therein against him Thomas Tierney so above charged as aforesaid. No finding was returned as to the defendant Peter James Tyrrell, who had died after the bill was found.

On Monday, April 15th, the appearance of the defendants was entered on the record, and the case was continued to the first day of Trinity term, and thence again to the 30th May, in the said term.

Upon Thursday, the 19th of April, in Easter term, a motion was made in the Court on behalf of each of the defendants for a new trial, on the ground, amongst others, of the admission of illegal evidence against the defendants respectively, and, being opposed by the Attorney-General, was by the Court refused; but Mr. Justice PERRIN dissented from the decision of the Court thereon, and Mr. Justice CRAMPTON expressed his concurrence with the opinion of Mr. Justice PERRIN on the case, so far as it affected the Rev. T. Tierney. The Attorney-General afterwards entered a *nolle prosequi* as to that defendant.

Upon Monday, the 27th of May, a motion in arrest of judgment was made on behalf of all the remaining defendants, but was opposed by the Attorney-General, and refused by the Court.

The defendants afterwards severally sued forth writs of error, *coram nobis*, and, with the exception of the defendant T. Steele, respectively assigned for error in fact, that the bill of indictment was found a true bill upon the evidence of certain witnesses for the Crown, who were produced before and examined by the grand jury, but who were not sworn or affirmed, and did not make solemn declaration, according to the statute in that case made and provided, in open *178 Court, before being so examined by the said grand *jury,

as by the Statute 56 Geo. 3, c. 87, is required. The defendant T. Steele, on his part, assigned for error in fact, that the indictment was not found and returned a true bill pursuant to the provisions of the Statute 1 & 2 Vict. c. 87, inasmuch as that, in stating the names of the witnesses so produced and examined, and whose names were indorsed on the bill of indictment sent before the grand jury, neither the foreman nor any other member of the grand jury, by his initials or signature, as is required by the last mentioned statute, did authenticate the fact, that the witnesses or any of them had been sworn or had made affirmation or declaration as aforesaid, nor state that no other witness or witnesses, save those named as aforesaid, was or were examined by or before the said grand jury.

The Attorney-General having pleaded *in nullo est erratum* in each case, issue was joined thereon, and the judgments were, after argument thereupon, respectively affirmed.

The defendants then brought writs of error in Parliament. (a) The case came on for argument on * Thurs- * 179

(a) The defendants assigned the following reasons for the reversal of the judgment : —

1st and 2d. Because the indictment was not found a true bill according to the provisions of the Statute 56 Geo. 3, c. 87, inasmuch as the witnesses examined before the grand jury, and upon whose evidence the said indictment was found, were not, nor was any of them, sworn in open Court ; by reason whereof the indictment was in effect found upon the evidence of unsworn witnesses.

3d. Because judgment ought to have been given for the defendants below, upon their respective pleas in abatement.

4th. Because there is not disclosed with sufficient certainty in the said indictment, or in any of the counts thereof, an agreement to commit an indictable offence.

5th. Because the charge contained in the first five counts of the indictment is a charge of too general and vague a nature to warrant or sustain any conviction or judgment thereon.

6th. Because, even supposing the said charge is sufficient in substance, yet the same is not stated or set forth in the indictment upon which the plaintiffs in error have been convicted, with the certainty which the law requires in such cases.

7th, 8th, 9th, 10th, 11th, 12th, 13th, and 14th. These reasons stated at full length the details of the objection taken in the fifth reason.

15th. Because the trial in this case was not fairly or justly had, and

day, July 4, when the Lord Chancellor, Lord BROUGHAM,
* 180 Lord DENMAN, Lord COTTENHAM, and Lord * CAMPBELL,

was also illegally had, inasmuch as the jurors who tried the same were selected and struck from a list of special jurors for the county of the city of Dublin, which had been fraudulently and illegally made and contrived for the purpose of prejudicing the defendants in their trial, and which was not constituted or framed pursuant to the provisions of the Statute 3 & 4 Will. 4, c. 91.

16th. Because judgment ought to have been given for the said defendants in error on the demurrers to their respective challenges to the array of the said panel.

17th, 18th, 19th, and 20th. Because the said trial was not duly or regularly had, inasmuch as the same was a trial at bar, which was commenced in term, and was continued into and concluded in the vacation after term ; and there was no authority by law for continuing the trial out of term, nor was there any proper continuance from the time when the verdict was given to the following term, when judgment was pronounced.

21st. Because the judgment has been and is given against the respective defendants for their supposed "offences aforesaid," whereas they have respectively been found guilty of a greater number of offences than they could by law be found guilty of under the said indictment ; and especially because D. O'Connell, R. Barrett, and C. G. Duffy, have, and each of them has, been found guilty, under each of the first and second counts of the indictment, of three conspiracies and offences ; and J. Connell, T. Steele, T. M. Ray, and J. Gray, have respectively been and are, and each of them has been and is, found guilty, under each of the first and second counts of the indictment, of two conspiracies and offences ; and because D. O'Connell, J. O'Connell, T. Steele, T. M. Ray, C. G. Duffy, J. Gray, R. Barrett, and T. Tierney, having been found guilty, under each of the first and second counts of the indictment, of conspiring with each other, could not, nor could any or either of them, be found guilty under the said first and second counts of the indictment, or either of them, of any further or other conspiracy or offence in which T. Tierney was not concerned, or of which he was not guilty, or any other conspiracy or offence whatsoever.

22d. Because each of the said first and second counts of the indictment charges each of them, D. O'Connell, J. O'Connell, T. Steele, T. M. Ray, C. G. Duffy, J. Gray, R. Barrett, T. Tierney, and P. J. Tyrrell, either with one offence only, or with separate and distinct offences ; and because, if each or either of those counts charges the said last named persons with a greater number of offences than one, then such count is bad for duplicity ; and if each of the said counts charges each of the said parties with one offence only, neither of the said parties could be legally found guilty under such count of more than one offence ; whereas D.

with other Lords, were present. The Judges had been summoned, and Lord Chief Justice TINDAL, * Mr. Jus- * 181

O'Connell, C. G. Duffy, and R. Barrett, have been respectively found guilty, under each of the said first and second counts of the indictment, of three distinct conspiracies and offences ; and J. O'Connell, T. Steele, T. M. Ray, and J. Gray, have and each of them has been found guilty of two distinct conspiracies and offences under each of the said first and second counts of the indictment ; and judgment has been given against D. O'Connell, C. G. Duffy, R. Barrett, J. O'Connell, T. Steele, T. M. Ray, and J. Gray, for the said offences.

23d. Because by the said verdict or finding upon the third count of the indictment, the jurors have found that D. O'Connell, R. Barrett, and C. G. Duffy, are, and each of them is, guilty of the premises in that count charged, which is ambiguous in this, that it does not find whether D. O'Connell, R. Barrett, and C. G. Duffy were or are guilty of conspiring with each other as in that count is mentioned, or of conspiring with J. O'Connell, T. Steele, T. M. Ray, T. Tierney, P. J. Tyrrell, J. Gray, and divers other persons to the jurors unknown, or any or either and which of them ; and because, if the finding of the jurors is to be considered as a finding that D. O'Connell, R. Barrett, and C. G. Duffy, were or are, or that each of them was and is, guilty of conspiring with J. O'Connell, T. Steele, T. M. Ray, T. Tierney, P. J. Tyrrell, J. Gray, and divers other persons to the jurors unknown, the said verdict or finding is void for repugnancy. (The nature of the alleged repugnancy, as afterwards insisted on in the argument, was fully set out.)

24th. Because the finding of the jurors upon the fourth, sixth, and subsequent counts of the indictment, are in like manner void for ambiguity, repugnancy, argumentativeness, and for not finding upon the whole matters in issue upon the said last mentioned counts respectively, and for finding divers of the parties charged by the indictment guilty of a greater number of offences than is charged against them by the said indictment.

25th. Because the defendants have been found guilty, under the first three counts of the said indictment, of a part only of the said counts respectively ; whereas by the law of the realm they should respectively have been either altogether convicted or acquitted of the whole of the several matters charged in and by the said counts respectively, inasmuch as the charges therein respectively contained were not, and are not, divisible, and were not, and are not, of a nature to warrant a partial conviction thereon.

26th. Because the judgment is void for ambiguity and uncertainty, and could not be pleaded in bar to any new indictment for the same offences.

27th. Because the verdict or finding in this case, being, for these reasons, ambiguous, repugnant, &c., cannot sustain or warrant the judgments given thereon ; and even if said verdict was sufficient upon certain

tice PATTESON, Mr. Justice WILLIAMS, Mr. Justice COLERIDGE, Mr. Justice COLTMAN, Mr. Justice MAULE,
 * 182 * Mr. Baron PARKE, Mr. Baron ALDERSON, and Mr. Baron GURNEY, accordingly attended.

of the counts of the indictment, yet, inasmuch as the judgments are respectively founded upon the entire verdict, and not upon particular counts of the indictment, or the finding returned upon such counts only, the judgments being respectively bad in part, are bad in the whole, and altogether void.

28th. Because there is no sufficient judgment in respect of any of the defendants, nor is there any sufficient entry of the said respective judgments upon the record, as there does not appear to have been any interlocutory judgment pronounced or entered against any of the defendants; whereas, by the law and custom of the realm, in every case of a conviction upon an indictment in the Court of Queen's Bench, where sentence of imprisonment may be given, and interlocutory judgment of *quod capiatur* should be pronounced or entered, to bring up the defendant to hear final judgment; and this not having been done in this case, the defendants were not duly or regularly brought into Court to receive judgment, and therefore the final judgment pronounced was and is for that reason irregular and void and contrary to law, as being thereby rendered in effect a judgment or imprisonment to commence *in futuro*.

29th and 30th. Because the judgment given in this case as to each of the defendants is illegal, as there was no authority in law to warrant the Court below in adjudging that the defendants should respectively or at all enter into and give such recognizances as are in the said judgments mentioned. And even supposing that the Court had such authority, yet the judgments are illegal for uncertainty, as it does not appear when such recognizances were to be entered into and given.

31st. Because the award of execution in this case, as to each of the defendants, was and is erroneous and illegal, as there was no judgment given by the Court to warrant or authorize the order that the sheriff should deliver the said defendants respectively into the custody of the keeper of the prison in said order mentioned, to be kept in custody as therein mentioned until they should have paid their several fines, and entered into the several recognizances thereby required.

32d and 33d. Because the award of execution is also erroneous for uncertainty and ambiguity, as it does not thereby sufficiently appear whether each of the said defendants is to be imprisoned for his respective term of imprisonment only, or for such term and until he or each and all of the defendants shall have paid the fines and entered into the recognizances required; and the period of imprisonment of each of the defendants is rendered not only uncertain, but dependent and conditional upon acts and things to be done by the others of the defendants.

The 34th reason was a general statement of error in the proceedings.

Sir T. Wilde, Mr. M. D. Hill, Mr. Kelly, Mr. Serjeant Murphy, Mr. Crompton, Mr. David Leahy, Mr. J. W. Smith, Mr. Close, Mr. Peacock, and Sir Coleman O'Loghlin, appeared as counsel for the plaintiffs in error.

The Attorney-General, the Solicitor-General, the Attorney-General for Ireland, Mr. Waddington, Mr. Napier, and Mr. Smyly, appeared for the Crown.

Sir T. Wilde, at the desire of the Lord Chancellor, stated the course proposed to be pursued. He said: — I appear for Mr. Daniel O'Connell; *Mr Peacock* is with me. The defendants throughout the indictment have defended separately; they have brought separate writs of error. The points on which they mean to rely are different from each other. With a view to the convenience of the House, we have proposed a certain arrangement in our mode of proceeding. We propose that *Mr. Peacock* and myself should be heard for Mr. Daniel O'Connell; that two other counsel shall be heard for the remaining parties; that is, that *Mr. Hill* shall be heard for Mr. Steele, and *Mr. Kelly* for all the other defendants. We have also, with a view to the convenience of the House, arranged that we shall not all address your Lordships on the same points. There are various important questions brought before the House by these writs of error. Some are applicable to some of the plaintiffs in error; some to others: and we propose that certain of us shall address your Lordships on certain points only.

THE LORD CHANCELLOR. — There is another point material for consideration. How do you propose to *ar- * 183 range about the replies; do you propose that there shall be one reply for all?

Sir T. Wilde. — No, my Lord; we propose that there shall be three replies. Of course we shall bear in mind that the circuits are close at hand; and, so far as it is consistent with justice, we shall act upon that knowledge. It has been with a view to that, I suggested the course of not having the

same points argued by all of us ; but I am afraid that it will not be practicable for me alone to reply for all.

The Attorney-General. — I do not like to interfere in any manner with any course which may appear convenient ; but I do not quite understand how my learned friend can say that all these parties appear separately, by three counsel, and can claim to have three replies.

THE LORD CHANCELLOR. — What we have now to consider is this, that in strictness, as all these defences are separate, the defendants are entitled to be represented by different counsel. They are, therefore, entitled, in strictness, to be heard by seven counsel, if they please.

The Attorney-General. — I doubt whether the bringing of seven writs of error is in itself a regular course.

LORD CAMPBELL. — I have not the smallest doubt, that where there are seven parties in a case of this sort, each has a right to be heard by himself or his counsel. A contrary practice might lead to great injustice, in several sup-
 * 184 posable cases. In a case like this, * a man is not to be bound by the arguments of counsel whom he never selected to represent his interest.

The Attorney-General. — The ordinary rule is, that the Crown should have the reply. What I want is, that in this case that may not be done which would be irregular, and yet would be drawn into precedent. What is now proposed does not seem to me in conformity with your Lordships' practice. Where there is an indictment against several defendants, the usual course is that there should not be separate writs of error. If one party brings a writ of error, he can call on the others to join in the writ or not. When, therefore, parties take the course of bringing seven writs of error on the same record, for the purpose of being heard by different counsel, where the points of law are the same, they cannot be heard in that

manner. I doubt whether these parties can have a writ of error in this form. I do not want to make any technical objection; but certainly this is not the usual mode of proceeding.

Sir T. Wilde. — As the defendants would have a right to be heard in person if they were all present, and possessed legal knowledge to put their cases properly before the House, they may be heard by their different counsel. They have separated in their defences: they have brought separate writs of error: they ought to be heard separately upon them. It might be productive of serious consequences if they were obliged to confide in counsel whom they had not selected. Their interests are separate; the imprisonment to which they have been sentenced must be separately suffered by each.

**The Attorney-General.* — I am not objecting to their * 185 appearing by as many counsel as they may think fit. What I want to call your Lordships' attention to, is the regularity of proceeding with regard to the reply. I believe that the practice always is for the Crown to have the reply. I state this in the first instance to the House that no one may be taken by surprise, and that the House may deal with the matter as it thinks fit. At least, there ought not to be three replies on the other side; or if there are three replies, they are to be regulated in the same spirit as the arrangement already mentioned to the House; namely, that different counsel should address themselves to different points. I submit this to your Lordships' consideration; but, first, I ask your Lordships' judgment as to the right to reply itself.

LORD CAMPBELL. — In the case of an appeal against a decree of the Court of Session, where the revenue was concerned, the counsel for the plaintiff in error had the reply. (a) A similar course was adopted in *Frost's Case*, when I was Attorney-General; and I well remember that the present

(a) Lord Douglas v. The Officers of State in Scotland, *ante*, Vol. IX., p. 174; and see Drake v. The Attorney-General, *ante*, Vol. X., p. 257.

Lord Chief Baron, who was one of the counsel for the prisoner, had the reply. (*a*)

THE LORD CHANCELLOR. — It is not necessary to decide that point now. As the case at present stands, *Sir T. Wilde* says that each of the three counsel for the plaintiffs in error claims to reply ; but it is suggested by the Attorney-

* 186 General that the course proposed as * to the opening should be applicable to this reply, and that each of the counsel should confine himself to particular points.

Sir T. Wilde. — I do not mean to say any thing that could deprive Mr. O'Connell of the benefit of my reply on all the points of the case, even those which are not included in the first argument I propose to address to your Lordships.

THE LORD CHANCELLOR. — It may be the understanding at present that no one will, in his reply, touch on the points argued by the counsel who preceded him, without absolutely binding you to such an arrangement.

The learned counsel then addressed the House for Mr. O'Connell and the other defendants. Their arguments on the different points were to the following effect : —

As to the challenge to the array, there are now two Acts for the regulation of juries in Ireland ; the 3 & 4 Will. 4, c. 91, and 4 & 5 Will. 4, c. 8. The 4th section of the former, and the 2d section of the latter statute, apply to this point. The provisions of these statutes have not been observed : one important list of names that ought to have constituted part of the jury-book has been lost. It is said that only a comparatively small number of names has been omitted from the list, but that is not the true way of trying the question ; for suppose all the names but one had been omitted, the prin-

(*a*) See *The Queen v. Frost*, 9 Car. & P. 165, in which the Judges, sitting in the Exchequer Chamber, held that in a case of high treason, where a point was reserved for the opinion of the fifteen Judges, counsel were heard as *amici curiæ*. *Sir F. Pollock*, on the part of *Frost*, was then allowed to reply to the arguments of the Attorney-General.

ciple would have been the same in both cases, though the practical difficulties may be greater in one case than in the other. It is not denied as a general proposition that the challenge to the array is not taken away by these Acts of Parliament; * but an exception to the right is at- * 187 tempted to be set up in the present case. What is the law on the subject? Lord COKE says (a) that challenge to the array is to be allowed for the unindifference of the sheriff; and the Year Books (b) show a case where, for such a cause, the array was quashed. By the old law, there can be no doubt that whatever objection there was to the array was remedied by the process of challenge to it. The statutes above referred to have directed certain officers to perform duties which anciently fell on the sheriff. By the error of these officers, a vice now exists in this array which in ancient times would have been met by the remedy of quashing it. The same purpose, that of securing a good panel, still exists: in principle, therefore, the right of challenge is continued. In the Court below this has been denied, and it has been treated as if this objection amounted to putting the recorder on his trial. It is no such thing: the error may happen from mistake as well as from fraud, but its consequences are equally injurious to the defendants. The recorder here does not exercise a judicial but a ministerial power. It is true that in *The King v. Edmonds* (c) a challenge as against the Master of the Crown-office was not allowed, and there Lord TENTERDEN treated that officer as in the same situation as elisors; the reason against allowing the challenge to either of them being that they were the immediate officers of the Court. The Court below has here made the strange blunder of putting the recorder, who under these Acts has a ministerial duty to perform, in the same situation as the elisors, and has therefore said that it has no power over him. The case of *The King v. Burridge* (d) * contradicts the * 188 supposition. There the challenge to the array was for the want of hundredors, — a matter not in the least degree

(a) Co. Litt. 156.

(b) 17 Edw. 3, p. 50.

(c) 4 B. & Ald. 471.

(d) 1 Str. 593; Ld. Raym. 1364; 8 Mod. 186-245.

connected with the partiality or the want of indifference of the sheriff. The challenge was opposed on the ground that the defendant had consented to the rule for a special jury, and had availed himself of the privilege accorded to persons to be tried by a special jury, in order to abuse it and defeat the rule of Court; he had struck the jury, and he had so exercised his privilege that he had prevented the trial by creating the very objection which was the ground of his challenge. He might have been punished for contempt for having so exercised his right, but the right of challenge was not and could not be taken away even in that way, and the challenge was allowed. Subsequently, however, the party was attached for the contempt. That is a very strong case, since it shows that where the right of challenge exists, it cannot be taken away even by the misconduct of the party. *The King v. Tiffen* (a) and *Anonymous* (b) are to the same effect. The right of challenge to the array of special juries has been admitted in Ireland, *Nolan v. The Queen*, (c) where it was allowed for the unindifferency of the sheriff. The main proposition is therefore established, that a challenge to the array exists in the case of special juries; and the exception to the rule being now limited to clerks and to the Master of the Crown-office, there is nothing to justify the challenge to the array being refused in the present case. A case has occurred in Ireland before the Judges on circuit, *The Queen v. Conrahy*, (d) where the opinion was expressed that

* 189 the *provisions of the statute regulating juries, the 3 & 4 Will. 4, c. 91, were, with respect to the qualifications of jurors, directory only, and not imperative.

[THE LORD CHANCELLOR. — Whatever is directory in an Act of Parliament is imperative; but the question is, what is essential to the validity of the thing to be done?]

The term used by a noble and learned Lord may with great propriety be adopted, and the argument will then be that

(a) Keb. 740.

(b) Styles, 233.

(c) 1 Hudson & Brook, 164.

(d) 1 Crawford & Dix, Circ. Rep. 56.

these provisions are essential. They are essential to the constitution of a good jury. The sheriff is bound under the statute to form his panel out of the jury-book. If the book does not contain all the names that ought to be there, he is limited in his selection of the panel, — a disadvantage which the law intended to prevent. There can be no calculation as to the number of names omitted; any omission is contrary to the provisions of the statute. The 11th section of the Act expressly directs that he shall have free access to the book, and shall not return any names but what are in the book. It is impossible for a statute to use stronger terms. If he does not take the book of one year, he may go to the book of the year preceding. If there is no book at all, he may use his own powers at common law. It is therefore clear that the provisions of the Act are essential. The inconvenience of allowing the challenge to the array is no argument against the right to it. The wrong was not denied in the Court below; the ground of refusal of the remedy was put entirely on the ground of inconvenience. It is not true that in this matter the recorder is a judicial officer. That may be so when he is determining who shall be on the list; but when he comes to that part of his duty which relates to causing certain matters to be done, his office is merely ministerial. But even if he can be considered a judicial * officer, * 190 still the rights of those parties in whose absence he decides cannot be finally barred by his decision, and the challenge to the array must still exist. The case most resembling the present is that of the examination of the qualification of voters for aldermen of London. That duty is performed by the recorder, but his judgment does not finally bind the parties. *The King v. Winchester.* (a) Even if what is now objected to should be defended on the ground that it is according to the practice of the Court, the answer is to be found in the observation of Lord Chief Justice PRATT, upon the practice of the Secretaries of State being vouched as the justification for issuing general warrants — “It is the submission of poverty to power.”

(a) 7 Ad. & El. 215.

The next point is as to the swearing of the witnesses. It appears on the plea in abatement, and on the assignment of errors in fact, that the witnesses either do not appear to have been sworn or affirmed at all, or if they were, the act was not performed in Court, as required by the statute. The swearing of the witnesses is regulated by two Acts of Parliament, the 56 Geo. 3, c. 87, and the 1 & 2 Vict. c. 37. The former was an Act passed to remedy the evil of a practice which existed in Ireland, of receiving before the grand jury the evidence of witnesses who had not been sworn at all. From the time of that statute to the year 1838, the witnesses were all sworn in open Court; but this practice was often found to be inconvenient, and the 1 & 2 Vict. c. 37, was passed to empower the foreman or any other member of grand juries in Ireland to administer oaths to witnesses on bills of indictment. By this Act the bills of indictment were to be

* 191 indorsed * with the names of the witnesses, and any member of the grand jury, twelve being present, might take the oath or affirmation of the witnesses; but then the grand jurymen so administering the oath or affirmation was himself to indorse the name of the witness on the bill, and no witness whose name had not been previously indorsed on the bill by the clerk of the peace or clerk of the Crown could be sworn or affirmed. The first question raised here is, whether this Act applies to indictments presented in the Court of Queen's Bench, or only to those presented at the assizes and quarter sessions. It is contended for the plaintiffs in error, that it does not apply to indictments presented in the Court of Queen's Bench. The preamble of the Act must not be resorted to here for its construction, the enacting part being sufficiently clear and unambiguous. The grand jurors have no absolute power here; the clerk of the Crown or the clerk of the peace must first indorse the names of the witnesses on the bill, in order to confer on the grand jurors the power to swear them. The clerk of the Crown is an officer who attends at the assizes, and the clerk of the peace performs similar duties at the sessions. The naming of these two officers shows the assizes and sessions to be alone meant. It cannot be said that the word assizes includes the Court of

Queen's Bench *proprio vigore*, so as to make that which clearly does belong to the assizes applicable by implication to the Court of Queen's Bench. Dr. Cowell's Interpreter, (a) citing Bacon's Abridgment and other authorities, gives a most particular description of the assizes, and of the persons who ought to attend, and of their duties, but does not contain one word to show its applicability to * the Court * 192 of Queen's Bench in Westminster Hall. Another proof of the complete distinction between the two is to be found in the fact that, notwithstanding the Statute of Westminster, it was necessary to pass statutes (18 Eliz. c. 12, and 12 Geo. 1, c. 31) expressly to enable the Courts at Westminster to try cases at Nisi Prius there, instead of trying them at bar. Lord COKE (b) recognizes and describes the distinction between them.

[THE LORD CHANCELLOR. — There is no doubt about that.]

Then the question resolves itself into this, whether there are any words in the Act which extend the meaning of it to the Court of Queen's Bench. There are no such words in the Act. The error here may be the subject of a plea in abatement, or of a writ of error. *Castledine v. Mundy*, (c) *The King v. Carlile*. (d) All the authorities on the point are collected in *Rogers v. Smith*, (e) where the error was, that there was no proper return of the *distringas juratores* by the sheriff; and the defect was held not to be cured by the Statute 21 Jac. 1, c. 13. The case of *The King v. Dickinson* (g) is to the same effect; but the Judges there, instead of having the matter argued, recommended a pardon. In *Stainer v. James* (h) the judgment was arrested, because the name of the sheriff was not indorsed on the *distringas*, nor on the return of the *tales*; and in *Blodwill v. Edwards*, (i) and in *Holdesworth v. Proctor*, (k) on a similar objection, the

(a) Tit. Assize.

(c) 4 B. & Ad. 90.

(e) 1 Ad. & El. 772.

(h) Cro. Eliz. 310.

(k) Cro. Jac. 188.

(b) 2 Inst. 422.

(d) 2 B. & Ad. 362, 971.

(g) Russ. & R. 401.

(i) Cro. Eliz. 509.

same result occurred. In *The King v. Richards*, (a) the Court of King's Bench held that an Act which in the most
 * 193 general terms empowered Courts to give the * costs of witnesses in certain cases of misdemeanours did not apply to a case where the indictment was removed by *certiorari* into the Court of King's Bench. In like manner it has been held that the 3d W. & M. c. 14, did not give an action of covenant, but gave an action of debt against the devisee of the land to recover damages for a breach of covenant by the deviser, though the words of the preamble were general enough to embrace all actions. *Wilson v. Knubley*. (b) On the principles adopted and declared in those cases, it is clear that this last Act does not apply to the Court of Queen's Bench in Dublin, and that the witnesses ought to have been sworn in open Court, under the provisions of the 50 Geo. 3. This defect is one which is of the very essence of the proceedings.

But supposing that the last Act does apply to the Court of Queen's Bench ; then the objection is that there is no certificate by the foreman or other member of the grand jury, attesting the fact of the swearing or affirmation of the witnesses. It cannot be said that this part of the statute is merely directory ; it is essential. The power which the statute grants is a new power unknown to the common law ; it is created by the statute, and must be used exactly according to the statute. It requires to be the more strictly followed, as it is a power to be exercised in secret. Suppose an indictment against one of the witnesses for perjury, in the absence of the certificate it would be impossible to prove that he was sworn ; the grand jurors themselves being sworn to secrecy as to the proceedings before them. There being a material defect in the proceedings here, it is impossible to say that the bill was duly found.

* 194 * The next point is that which relates to the form of the indictment. A general form of indictment like this has always been considered as improper ; it prevents a good defence at first, and a chance of appeal afterwards. What is

(a) 8 B. & C. 420.

(b) 7 East, 128.

it that constitutes a conspiracy? not merely a combination of persons for a common purpose, for that purpose may be legal. In political matters especially, no change of laws or public policy can be effected but by the combined labours of several individuals. But then it will be said that these defendants are distinctly charged with combining to create discontent and disaffection in the Queen's subjects; and that this is a charge of a clear and positive offence. Such a phrase has no legal meaning. Nor is there any such meaning in the phrase in the third count, "combining for the purposes of unlawful and seditious opposition to the government;" for every man would decide the meaning of those words by his own political opinions. The law cannot recognize such a variable standard of guilt or innocence. The allegation is uncertain, and therefore bad. The law requires a strict description of a criminal charge, and holds vague and general allegations to be insufficient. *The King v. Perrott.* (a) There Lord ELLENBOROUGH said, "Every indictment ought to be so framed as to convey to the party charged a certain knowledge of the crime imputed to him." "It is part of the duty of those who administer justice to require that the charge should be specific, in order to give notice to the party what he is to come to be prepared to defend, and to prevent his being distracted amidst the confusion of multifarious and complicated transactions." These words express the principle on which all indictments should be framed. That principle has not been observed here.

* Again, one charge here is, that of causing a large * 195 number of persons to meet together, to procure by intimidation a change in the government and constitution of the kingdom. To procure a large meeting to assemble is no crime. Then, what is intimidation? In law it has no meaning: but even if it had, it is not shown to be unlawful, and intimidation may be lawful in itself, and lawful in its object. It may be the intimidation employed by an officer of the law, to prevent a breach of the law; it may be the moral intimidation which one man employs towards another, to prevent

(a) 2 M. & Sel. 879.

that other from indulging in a vice. To make any thing of the charge of intimidation, it ought to have been shown of what nature that intimidation was; that it was bad and unlawful in itself, and was employed for unlawful purposes. It ought also to have been shown on whom that intimidation was intended to operate; for otherwise, an attempt to intimidate, when nobody is pointed out as the person to be intimidated, is absurd. It is clear that such a charge is now relied on for the first time; for in the case of *The King v. Lord George Gordon*, (a) though the means employed by him were those of intimidation, the offence itself that was charged upon him was high treason. If it should be said that this must apply to intimidation intended to operate on the legislature, the answer is, that the law will not presume the legislature to be capable of being intimidated.

Then, as to the charge of a conspiracy to bring into hatred and contempt the tribunals of the country: that charge is as objectionable as the others. It is vague, undefined, and without any legal meaning. In the first place, the word * 196 "tribunals," though a term * of revolutionary France, is unknown to the English law; in the next, supposing tribunals to mean the Courts of Law, then every attempt to improve, by changing the mode of administering the law, would be subject to a charge of this sort. Yet such attempts are not unlawful; they are often made by bodies of men, both in and out of Parliament. And if the words, "to bring the existing tribunals into contempt, and to submit disputes to others to be constituted and contrived for that purpose," are relied on as stating a clear legal offence, then the commissioners who reported on the Ecclesiastical Courts have brought themselves within both parts of the description, and have incurred the same guilt as these defendants. The same may be said of all the witnesses examined before those commissioners, who stated what they conceived to be gross abuses in the old Courts, and recommended the substitution of other Courts. This shows that the charge is too vague and indefinite to be supported. Thus the ninth count charges

(a) 21 Howell's St. Tr. 485.

a conspiracy of the same nature, but adds, that the defendants endeavoured to assume and usurp the prerogatives of the Crown, in the establishment of Courts of Justice. That charge is too general. How and in what manner were they to usurp the prerogatives of the Crown? Were they to have a Great Seal? That is not charged as one of the overt acts. A man may, without violating any law, offer himself as a general arbitrator. The rule of criminal pleading is, that "every indictment must charge a man with a particular offence, and not with being an offender in general;" Hawkins. (a) In *The Queen v. Vincent*, (b) Mr. Baron ROLFE treated a charge of endeavouring to excite disaffection and * hatred to the law, as one which, standing alone, * 197 was a mere assemblage of idle words. A charge of a conspiracy to cheat and defraud a party of the fruits and advantages of a verdict obtained by him, was held to be too general, and therefore bad in law. *The King v. Richardson*. (c) It was said there, that in an indictment for a conspiracy, "it is essential that the parties should be shown to have conspired to do something which the law would contemplate as an illegal act; and an offence at common law should be clearly stated, not in figurative or doubtful terms, but in words to which the law assigns a specific meaning." That rule cannot be said to have been observed here. *The King v. Gill*, (d) which will be cited on the other side, has never met with the approbation of the profession: it is not considered an authority. But the authority of *The Queen v. Parker* (e) is recognized; and there an indictment for a conspiracy to obtain, from persons named, divers goods and merchandises, and to defraud them of the same, was held bad, for not showing whose goods and merchandises they were. In *The King v. Cooper*, (g) an indictment for endeavouring to stir up strife amongst "his Majesty's liege people," without saying *ad commune nocumentum* of the de-

(a) Pleas of the Crown, Bk. ii., c. 25, § 59.

(b) Not reported; stated to the House on the authority of *Mr. Serjeant Murphy*, who was of counsel in the case.

(c) 1 Moo. & R. 402.

(d) 2 B. & Ald. 204.

(e) 8 Q. B. 292.

(g) 2 Str. 1246.

fendant's neighbours, was held bad, as too vague and general. So was an indictment against several for meeting together for the purpose of committing with each other certain indecent practices. *The Queen v. Rowed.* (a)

In addition to the general objection to the form of the indictment, another arises upon the defectiveness of some of the counts in it. It is submitted that there are several bad

counts in this indictment, but two of them are most
* 198 obviously so. These are the * 6th and the 8th. The

6th count contains the charge of the "demonstration of physical force," and thereby causing "intimidation;" the 8th count, the withdrawing of causes from the ordinary tribunals of the country. As to the first of these two counts, it is bad for uncertainty. A conspiracy must be alleged and shown to have some unlawful object, or to propose to accomplish some indifferent or even lawful object, by unlawful means. But this object and these means must be shown to be unlawful; it is not enough to call them so. *Francis v. Stewart*, (b) decided a short time since in the Court of Queen's Bench. The mere fact of procuring large numbers of persons to assemble is not unlawful; nor is a combining to effect a change in the government unlawful, for otherwise all the persons who agreed to take measures for effecting the union with Scotland, or the union with Ireland, would have been guilty of an unlawful act. Then the object not being unlawful, are the means unlawful? They are not shown to be so. The count alleges that these changes are to be brought about by "intimidation." Intimidation of whom? It does not appear on whom the intimidation is to operate. The same objection applies to the allegation as to the "demonstration of physical force." What is the meaning of the phrase in English, it is not easy to understand; it is a French phrase, and may be intelligible in France, but in England it has no meaning, and certainly no legal meaning of the kind here assumed; for demonstration means certainty of proof. If it should be said that there is the phrase, "exhibition of physical force," which is English and has a meaning, then the

(a) 3 Q. B. 180.

(b) Not yet reported.

objection arises that there is no allegation as to the persons on whom this exhibition * of physical force is * 199 to take effect. The want of this allegation cannot be supplied by presumption. An indictment for obtaining money under false pretences is bad, unless it states who is to be defrauded by the false pretences, and of what he is to be defrauded. *The Queen v. Peck.* (a) The count alleges nothing which is necessarily illegal. There may be cases supposed in which it would be perfectly legal to procure a change in the law by means of intimidation through the exhibition of physical force. But if there can be any one supposable case in which such a proceeding would be lawful, the count which does not expressly and distinctly show it to be unlawful is uncertain, and therefore bad. *The Queen v. Peck* is an authority upon both these points. Here, indeed, the objection is extremely strong; for it is not shown that the persons to be intimidated were subjects of this realm, and, for any thing that appears on the face of the count, they might be the Queen's enemies. If the greatness of the numbers is to constitute the illegality, then the greater the number of persons who on an apprehension of public danger came forward to be sworn in as special constables, the greater would be the illegality of their doing so. The introduction in a count of the words unlawful and seditious will not convert an otherwise lawful into an unlawful matter. *The Queen v. Rowed*, (b) *The King v. Cheere.* (c) On these grounds it is submitted that the 6th count is bad in law.

Then as to the 8th count. The substance of that count is a charge of an endeavour to bring certain tribunals into hatred and contempt. What tribunals? It does not mean all the tribunals of the country. Is it illegal in a free country, if a tribunal is believed to be mischievous, to endeavour to bring it into hatred * and contempt, with * 200 a view to its being changed? No authority has yet decided that such is the law. Had it been so decided, there would have been no chance of our adopting those amend-

(a) 9 Ad. & El. 686.

(b) 3 Q. B. 180.

(c) 4 B. & C. 902.

ments which experience is constantly suggesting ; and the Star Chamber itself might have flourished at this day. But further, what is this charge of creating hatred and contempt towards the tribunals ? Are those feelings to be excited as to a single Judge ? If so, that would be illegal ; but that must be shown, and it is not shown here. But if the words of the count have any meaning, the hatred and contempt are to be directed against the system under which the laws of the country are administered ; for the words “ the tribunals,” as used here, must be taken to mean the system. That cannot be illegal ; for the question whether the system deserves to be hated and despised is a mere matter of opinion, and no one can be criminal for simply holding the affirmative or the negative of it. The latter part of the count is equally objectionable. The charge is that of endeavouring to withdraw disputes from the cognizance of the tribunals. It is not said how : it may be by procuring an Act of Parliament to be passed. As it may be by legal means, the count sets forth no offence if it does not show the means to be illegal. But then it will be said that the latter part of the count charges that the combination is with the intent to transfer the cases to the adjudication of other tribunals. It is not said how, nor to what other tribunals ; and it may be to other tribunals established by Act of Parliament. A general charge of this nature is bad in law ; the offence ought to be shown with certainty : and for such vagueness and uncertainty as this, a charge against certain persons as “ Lollards and false heretics, *et communes proditores*,” was held bad. (a)

* 201 * Then, the verdict is bad in many respects. The verdict on the first count amounts to a finding of three of the defendants “ guilty of the premises ; ” that is, of conspiring with the other five defendants to accomplish the purposes charged in that count, while it finds the other five not guilty of conspiring with them : this finding is contradictory, repugnant, and absurd. The finding that the defendants have been guilty of the premises is impossible and absurd in this case. “ The premises ” must mean, if the word has any

(a) 3 Inst. c. 5; tit. “ Heresy,” p. 41.

meaning at all, all the circumstances previously stated. Now as one of the defendants was dead, and as several of the defendants were declared not guilty of many of the objects of the alleged conspiracy, it is impossible that any one of them can be truly said to be guilty of the premises. The finding is absurd, and therefore void. Comyns's Digest. (a) It cannot be made out to be a finding that the three parties were guilty of conspiring with each other; and the finding, if such was intended to be its meaning, ought distinctly to have stated it. In *The King v. Hungerford*, (b) the defendant was indicted for feloniously and burglariously breaking and entering a dwelling-house, and stealing goods therein of the value of 6*l.*; the verdict was, not guilty of the burglary, but guilty of stealing in the dwelling-house. The Judges held that the finding was sufficient to warrant a capital punishment, if the officer drew it up in a proper form; but they said that they should direct an entry of not guilty of the breaking and entering in the night, but guilty of the stealing above the value of 5*l.* The verdict there was consequently made most distinct and correct. The same practice ought to have been observed here; and not having been observed, the entry of the verdict appears to be uncertain and void. * A * 202 verdict ought not to be argumentative. Comyns's Digest. (c) Where the issue is whether an estate might be granted in tail, a finding that it might be granted in fee is void, though a grant in fee is greater than, and therefore includes, a grant in tail.

The judgment itself is defective in form as well as substance, and the House has no power to amend it, but must reverse it: The punishment being discretionary, and therefore capable of being varied by the different degrees of guilt of the defendants, must be left entirely with the Court which tried the parties; so that the House cannot remedy its defects by passing any fresh judgment. In consequence of the defective form of entering the judgment, the defendants would have no means, on any future occasion, of defending them-

(a) Tit. Pleader (S. 23). See also Hawk. P. C. Bk. ii., c. 47, § 8, citing Popham, 202.

(b) 2 East, P. C. 518.

(c) Tit. Pleader (S. 22).

selves against the repetition of the charge. Suppose these defendants were again indicted for conspiring with Tyrrell, the judgment would not enable them to show that they had before been indicted with him, and had been acquitted of that particular conspiracy.

There can be no doubt that the Court has given judgment against the defendants in respect of three different conspiracies, when only one has been found by the jury. It cannot be said that the Court did not intend to do this; for the expression in the judgment is, that the several defendants are to be punished "for their offences aforesaid." What are they? Are they those of which the eight defendants, or the seven, or the three, are found guilty? The judgment is uncertain and insensible; and being so, it is void, for no one ought to be punished without knowing for what offence he was punished. Upon such a judgment as this the defendants might be again indicted and again punished, for

* 203 what was in fact the same * offence. Taking each count to contain a charge of a distinct offence, then the grand jurors presented eleven offences; and the petty jurors have found the defendants guilty of fifteen. The increase of the number of offences, where the sentence is in respect of the "offences aforesaid," must have had its effect in aggravating the punishment, and the error in the form of the finding must, therefore, have occasioned a real and substantial injustice. The judgment here has, in fact, been given for more offences than are charged in the indictment, or have been pleaded to by the defendants. But one conspiracy is charged in the first count, one conspiracy laid at one time and place, and on one occasion; so that, under that count, no one defendant can be found guilty of more than one conspiracy. The jurors, in presenting the indictment with the count so framed, have presented the defendants as guilty of the offence there alleged. That is but one offence, one conspiracy; yet some of the defendants have been found guilty of three several conspiracies, and are now suffering punishment for these three conspiracies. The effect of this finding on this indictment may be thus exemplified, by reference to a case of a simpler kind than the present: suppose eight persons to

be charged with a conspiracy to cheat A. B. of three horses, black, white, and gray : suppose the proof to be that they met in a room, and came to an agreement to cheat A. B. of the black horse, but that C. and D., two of the conspirators, refused to have any thing to do with cheating him of the other two horses ; that these persons then retired, and that the other six afterwards agreed to cheat him of the white horse, and E., F., and G. then retired, and that H., I., and K. then agreed to cheat him of the gray horse ; there would

* then be three different conspiracies, having different * 204 objects in view, and requiring for their accomplishment different means and different periods of time. It is plain that neither in law nor fact could the whole eight defendants, upon such an indictment, be found guilty of one conspiracy to cheat A. B. of all the three horses, nor could there be a finding that all were guilty of conspiracy to cheat A. B. of the black horse, and also a finding that H., I., and K. were guilty of conspiracy to cheat him of the gray horse : for, otherwise, there would be an indictment charging one conspiracy between eight persons, and a finding of three distinct conspiracies, only one of which was that which had been charged in the indictment. The charges here are contradictory. If A. and B. are jointly indicted for conspiracy, and B. is acquitted, A. must also be acquitted, not merely because one person cannot alone be convicted of conspiring, but because A. is on the record charged with a specific conspiracy with B., and if B. did not conspire, A. could not have conspired with him. It would be the same if there were more than two persons charged with conspiring together, and it should appear at the trial that one of the number did not conspire at all ; for then the specific conspiracy charged never existed. In the case supposed, it therefore follows that on that indictment H., I., and K. ought not to be convicted of conspiring to cheat A. B. of all the three horses ; for the conspiracy charged against H., I., and K. was made with them in common with five other persons, no one of whom had in fact conspired with them to cheat A. B. of more than one particular horse. If such a finding is contrary to law, a judgment on that finding must be bad, for it would be impossible to say in respect of what offence

* 205 the judgment is pronounced : * indeed, it plainly appears here to have been pronounced upon a charge of three distinct conspiracies, when the indictment charges but one. Why is it that when once a conspiracy has been formed the subsequent acts of any one conspirator become evidence against the whole? It is because these acts, though the acts of one individual, are directed to attain a common object? The moment there ceases to be a common object, that moment the acts of any one individual affect only himself. Mr. Baron ROLFE acted on this distinction in his charge to the jury in *Feargus O'Connor's Case*. The distinction is most important. It may be shown by a very strong case: suppose eight persons signed one paper, by which all the eight agreed to murder a particular person, five of the eight agreed to rob a garden, and the remaining three to stop a man on the highway, would that one paper contain one or several agreements? Suppose such a paper, instead of containing an agreement of a highly criminal kind, amounted to a civil contract, enforceable in a Court of Law, must not the person who sought to enforce it sue upon it in different counts, as for different contracts? Trying this matter, therefore, either by the test of criminal law or of civil pleading, it is indisputably clear that the agreements would be several and distinct. There are here findings of three conspiracies, where the jurors were empowered to inquire and find as to one alone.

None of these findings can be rejected, and the record amended; for the form of judgment is general and inclusive, "for their offences aforesaid." The reason why a Court cannot in a civil case correct the finding of a jury where general damages are assessed on a declaration containing bad as well as good counts, is that the Court cannot perform the functions of a jury in assessing the damages. That

* 206 reason * applies here: this House cannot perform the functions of the Court below in assessing the punishment on an indictment where some of the counts are bad, and where it is impossible for the Court of Error to know the exact amount of punishment which has been awarded in respect of those bad counts. There can be no doubt that such an objection would be good in arrest of judgment; or if

there were good counts and good findings on them, the Court might not arrest the judgment, but might enter it on those good counts and good findings alone. But where that had not been done, the objection would for the very reason of the neglect to do it become the stronger ground for a writ of error; for that is the only remedy for a judgment which ought never to have been entered. The punishment is wrongfully increased. Suppose that three men, needy and hungry, should agree to go to a baker's shop and steal a loaf: that is a conspiracy to commit a felony. But suppose the same persons to conspire at the same time to break open a house and murder its inmates, and rob the house; suppose them convicted of these offences, upon two different counts contained in the same indictment; suppose, after argument, the Court should hold both counts to be good, would it give the same and no greater punishment for the two accumulated offences than it would give if it held one of the counts to be bad, and especially if that count so deemed bad was the count charging the conspiracy to break open the house and commit the murder? But take another view of the same case: suppose the Court below should give a general judgment, compounded, as it must be, of awards of punishment for one and the other offence; and suppose a writ of error brought; the argument on the other side will be, that the Court of Error, though convinced that the count charging the conspiracy to rob and murder was bad, * must yet affirm the * 207 judgment. It is impossible to conceive a doctrine more completely at variance with the first principles of law and justice. But, then, it is said that the Court of Error is bound to presume that the judgment has been given in respect of the offences of which the defendants have lawfully been convicted; and that, consequently, no part of the judgment has been given on what may be ultimately pronounced to be bad counts in the indictment. It is contrary to all experience to make such a presumption, and the presumption, if made, would no doubt be contrary to the fact. It ought not, therefore, to be made; but, assuming it to be made, that would not obviate the objection; for suppose the Court below had entered the judgment in terms, "upon all of the afore-

said offences of which the defendants have been lawfully convicted :” such a judgment would be bad in form as well as substance ; for it would leave it doubtful in respect of which offence the defendants were convicted. How, then, can it be argued that the presumption that such a judgment has been pronounced is to render it valid, when if it had been so pronounced in form it would have been invalid ? It is not sufficient to say, in a case where the heaviest and the lightest offences have been charged in one indictment, and a general judgment has been given, and it afterwards appears that the counts charging the greatest offence cannot be supported, that the party may petition the Crown. Such a proceeding is contrary to the spirit of the English law, which does not seek to secure men from injustice by the favor of the Crown, but by the rules of law, and which establishes their rights, and does not put them on receiving those rights in the way of mere favour and indulgence. The cases of *Peake v.*

* 208 *Oldham (a)* and *Grant v. Astle (b)* have * been mistaken ; they do not lay down any doctrine, but proceed on a supposed rule ; and *The King v. Ingram (c)* is not wrong in itself ; for the Court may in the first instance enter the judgment on the good counts ; but it is wrong in the application of it here ; for judgment having been entered, a Court of Error cannot tell whether it has been so entered or not. *The King v. Benfield (d)* is open to the same observations. Under such circumstances a Court of Error stands in a criminal case, with relation to the judgment of the Court below, in the same situation in which an ordinary Court does with relation to the verdict of a jury in assessing damages ; and the result is, that the erroneous judgment, like the erroneous verdict, must be reversed.

Then assuming the judgment to be a general judgment on an indictment containing bad as well as good counts, it is submitted that it cannot be supported. The same rule which applies in civil is applicable also in criminal cases. A general judgment on an indictment where some of the counts

(a) Cowp. 275.

(c) 1 Salk. 384.

(b) Doug. 722.

(d) 2 Burr. 980.

are bad, is like a general verdict on a declaration where some of the counts are bad: it cannot be supported. The Court discharges those functions in a criminal case which in a civil case are discharged by a jury: the Court awards the punishment, as the jury awards the damages. Where there are any bad counts in an indictment, it cannot be presumed that the Court will, except through error, give a judgment which proceeds as much on the bad as on the good counts: and if the Court has committed error, that error must be corrected. But where the form of the judgment is such as to prevent the Court of Error from seeing how far the Court below has proceeded * on the bad, and how far on the good counts, * 209 the whole judgment must be reversed. This House can, in such a case, no more apportion the punishment among the good and the bad counts than another Court can apportion the damages among them. The whole judgment is tainted with the error, and must therefore be reversed. If this was not so, no person would be safe. The doctrine of intendment cannot be applied to such a case. Suppose a man convicted on an indictment containing three counts, the Queen's Bench might hold the first to be good, the Exchequer Chamber might think the second was the only good count, and this House might declare both the first and second to be bad, but might hold the third to be good. How, in such a case, could it be intended that the Queen's Bench had given judgment only on the good count? Suppose a man acquitted on such an indictment to be again indicted on some of those charges contained in counts which are bad, is he to plead *autrefois acquit*, or *autrefois convict*? The record, however erroneous its statements, would be binding upon him. *The King v. Woolfe*. (a) The doctrine of intendment, applied to such a case, would lead to inextricable absurdities. The case of *The King v. Fuller* (b) shows that the judgment ought distinctly to state on which of the counts it is entered up. The case of *The King v. Ingram and Wife* (c) will be relied on by the other side. That was an

(a) 1 Chit. 401.

(b) 1 Bos. & Pul. 180.

(c) 1 Salk. 384.

indictment for an assault and battery; the indictment in one part alleged *insultum fecit*, in the singular number; in another part, the allegation was *verberaverunt, vulneraverunt, &c.* The jury found both guilty. An objection was

* 210 taken, that as *fecit* was in the singular number, * it was uncertain which of the defendants was charged; but

Lord Chief Justice PARKER held the indictment good, because the other words charging a battery were in the plural; and though there might be an assault without a battery, there could not be a battery without an assault: and he then added, "In a civil action, where one part of the declaration is ill, and the jury find entire damages, the judgment must be arrested, because the Court cannot apportion them; but in indictments the Court assesses the fine, and will set it only according to those facts which are well laid." These observations were either *obiter dicta*, or they are contrary to the principles of law. They were not necessary: for upon the other observation that a battery included an assault, the indictment might, perhaps, have been supported. The cases of *Peake v. Oldham* (a) and *Grant v. Astle* (b) will likewise be referred to. In the former Lord MANSFIELD said, "In civil cases the rule most certainly is settled, that where a verdict is taken generally, and any one count is bad, it vitiates the whole. It has always struck me that the rule would have been much more proper had it said that, if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad. In criminal cases the rule is so." In the latter case, referring to the same rule, he says, "And what makes this rule appear more absurd is, that it does not hold in the case of criminal prosecutions; for when there is a general verdict of guilty on an indictment consisting of several counts, if any one of them is good, that is held to be sufficient." These are the two great authorities for the proposition that this general verdict, on an indictment containing several bad counts, can be sustained. It is

* 211 submitted with the greatest confidence, that these * cases are no authorities for such a purpose. The words were

(a) Cowp. 275, 276.

(b) Doug. 722, 730.

uttered merely in illustration of an argument, and by way of expressing a regret at the existence of the rule which, in civil cases, vitiated a whole judgment when one count alone was found to be bad. They are not the deliberately expressed opinions of Lord MANSFIELD, on a point then judicially under consideration. If they were so, then it is insisted that they are contrary to the first principles of law, and must be overruled.

In *The King v. Benfield*, (a) Lord MANSFIELD says, "The Court will give judgment on that part which is indictable." The meaning of which is, that the Court will pass judgment on a party in respect of that offence of which he has been lawfully convicted, but not on all the counts in the indictment. But on what principle is it that there should be a difference between civil and criminal cases in this matter? Why is the rule in criminal to be less strict than in civil cases? Why is a Court of Error to presume that the Court below has founded its judgment solely on the good counts? And especially, why should such a presumption be made when the record shows a judgment upon the whole of the counts, and not on any particular counts among them? Suppose there was an indictment consisting of five counts,—four for a very malicious libel, and one for a very trifling assault; suppose a conviction and a general judgment, and a sentence of a most severe kind, and then a writ of error, and the counts on the libel should appear to be wholly bad and the count for the assault good, how could the House assume that the judgment was given only in respect of the assault? But further, suppose there was * a pardon for the as- * 212
sault, how could the defendant obtain his liberty? He could not obtain it at all, though there would then be no count in the indictment on which he ought to be imprisoned. This (if such a judgment as the present can be maintained) is a possible case, yet it is by no means one which the principles of the law will allow. But many other examples of even more absurd and unjust consequences arising from such a rule may be imagined.

(a) 2 Burr. 980-985.

The judgment here is bad in another respect: it contains no entry of acquittal, though the finding shows some defendants were pronounced not guilty upon parts of the indictment: this renders it void: Viner's Abridgment, (a) where it is said, "In trover and conversion of goods, if the defendant be found guilty of part and for part not guilty, but no judgment is given for that of which he is so found not guilty, as it ought to be, this is erroneous." *Wood v. Dr. Sutcliffe*, (b) and *Rolle*. (c) That defect cannot be amended. *The King v. Walcot*. (d) There the judgment was reversed, as the words "*ipso vivoque comburentur*" were omitted. Bacon's Abridgment (e) also shows that a judgment being an entire thing, it cannot regularly be reversed for part and affirmed for part. *The King v. Kenworthy*, (g) *The King v. Ellis*, (h) and *The King v. Bourne*, (i) are all to the same effect; the Court declaring in the last, that where there was an erroneous judgment on a good indictment, it could neither pass the proper sentence nor send the case back to the Court below, but must reverse the judgment; which it did, * 213 and the defendant was discharged. Viner's Abridgment (k) and Bacon's Abridgment (l) show the principle on which this rule is founded.

The proceedings are irregular here, by reason of the absence of the proper continuances. There is a discontinuance between the time of the finding of the verdict and the following term: for the purpose of this argument, the days must be assumed to be days in term. The 1 & 2 Will. 4, c. 31, § 3 (Ir.), must be referred to here. The trial began in term, and in term the order of the Court was made. That was a conditional order, declaring, that in case the trial shall not conclude within the term, some additional days shall be added. This order is bad as being in form conditional, and therefore uncertain: it ought to have fixed a certain number

(a) Error (B. b.), pl. 18.

(b) Cro. Jac. 439.

(c) Rolle's Rep. 293, pl. 8.

(d) 4 Mod. 395; Shower's P. C. 127, 129.

(e) Tit. Error, M.

(g) 1 B. & C. 711.

(h) 5 B. & C. 395.

(i) 7 Ad. & El. 58.

(k) Tit. Error (B. b.), pl. 18.

(l) Error, M. 2.

of days, and those days would then have been days forming part of the term. The statute says, "Provided that if any trial at bar shall be directed by any of the said Courts, it shall be competent to the Judges of such Court to appoint such day or days for the trial thereof as they shall think fit; and the time so appointed, if in vacation, shall, for the purpose of such trial, be deemed and taken to be a part of the preceding term." The order here spoken of is plainly an absolute and not a conditional order. Even assuming this to be a remedial Act, still the order is void, as not being a compliance with the provisions of the Act. The case of a trial partly in term and partly in vacation has not been provided for by the Act: for that very reason the Court ought to have made the order in such form as to constitute the added days, days in term. There was here neither a proper continuance from the commencement of the trial to the days out of term, nor from the 12th of February, when the verdict was delivered, to the following term. In *Bradley v.*

* *Bankes*, (a) there was an appeal of murder by the * 214 wife, on the death of the husband. Certain objections were taken, because of the discontinuance of the writ of appeal. It was said that this was aided, as the proceeding was in term; but the Court resolved the contrary. *The King v. Tucker* (b) and *Hawkins* (c) are to the same effect. It may be said that a voluntary appearance will cure this objection. But in the first place, the appearance of the defendants here cannot in any sense be called voluntary; and in the second, the case of *The King v. Walcot*, (d) citing *Simpson's Case*, (e) affords an answer to the argument. There a man was attainted of murder; he brought a writ of error for this cause, and it appeared that he had been indicted on the 18th March, 8 Charles 1, and was tried on the 20th. There was no continuance between these days; and this was alleged as error in fact, and was admitted, and was said not to be amendable, because it was a criminal case.

(a) Cro. Jac. 283; Yelv. 284.

(b) 2 Ld. Raym. 1061.

(c) Pleas of the Crown, Bk. II., c. 27, § 84.

(d) 4 Mod. 395.

(e) Rolle's Abr. 196.

The last point is, that the judgment is bad, as it orders the defendants to enter into recognizances to “keep the peace and for good behaviour for the space of seven years next ensuing the acknowledgment thereof.” It was formerly doubted whether the Courts could, as part of a sentence, direct parties to enter into recognizances to keep the peace. That question was considered before this House on error, in *The King v. Hart and White*, (a) and the right to do so “for a reasonable time” was affirmed. But the order here is bad in itself; the term fixed here is not reasonable. It is a fixed period of seven years from the date of the acknowledgment of the recognizances; so that a defendant, unable to * 215 obtain sureties, might be *imprisoned for his whole life. The date ought to have been fixed at the commencement or at the termination of the imprisonment; and then, if the sureties were not obtained, as the imprisonment of the party during the time for which the recognizances were required would answer the same end, he would be relieved from further confinement. All the precedents are in that form.

The Attorney-General, and the Attorney-General for Ireland (with whom were *the Solicitor-General, Mr. Waddington, Mr. Napier, Mr. Smyly*), appeared for the Crown, and argued to this effect: The main proposition on the other side is, that where, in a criminal case, there is a general judgment on an indictment, some counts in which are good and some bad, the judgment must be reversed. This rule is said to apply more particularly where the punishment is discretionary, and much argument has been employed to show the hardship that may result to defendants if such should not be established as the rule of practice which is to govern criminal proceedings. The rule in civil proceedings has been referred to, but that furnishes no analogy in favour of the proposition put forward for the defendants. It is necessary to have a record, and a verdict in accordance with it, in order to warrant a judgment in a civil case; and if the record contains

(a) 3 St. Tr. 1344.

two counts, one of which is bad, and the judgment is for damages upon the whole declaration, then, as it is impossible to say what portion of the damages has been assessed upon one, and what portion upon the other count, the whole judgment must be reversed, and a *venire de novo* awarded. The reason for this is, that as the jurors do not administer the law, but only give a judgment upon facts, it may be that their * judgment on facts has been pronounced in * 216 respect of a count which was not sustainable. In such a case the record and the finding do not warrant the judgment; but it is otherwise in a criminal case. And so it must be, for the sake of the public safety; for by the argument on the other side, a man who is convicted on an indictment containing several counts, on each of which there is in fact a verdict against him, will escape altogether, because one of them happens to be bad. The case of *The King v. Fuller* (a) is an authority in favour of the validity of this judgment; for it shows that in misdemeanour, where the punishment is discretionary, the Court will give judgment, if the record and the verdict warrant the judgment. In *The Queen v. Rhodes and Cole*, (b) there was an information for subornation of perjury, and it was moved in arrest of judgment that there were several assignments of perjury, and the fine being entire, if one assignment of perjury was wrong, the general judgment could not be supported. And in the argument, the analogy to proceedings in civil cases was relied on: "But Lord HOLT and the whole Court were of the contrary opinion; saying, that if all the assignments of perjury but one were wrong, yet that one would be sufficient for the Court to give judgment upon against the defendant." The reason of the distinction between the two classes of cases is plain. In civil cases the jurors deal with the facts; in criminal cases the Court has to deal with the record; and in awarding judgment, will award it upon those counts which are good. The case of *The King v. Powell* (c) is a very recent authority in support of this proposition. There a ,

(a) 1 Bos. & Pul. 180.

(b) 2 Ld. Raym. 886.

(c) 2 B. & Ad. 75.

defendant was charged upon an indictment containing
 * 217 two counts. The first * charged an assault, with intent to ravish; the second, a common assault. The jury found the defendant guilty of a misdemeanour and offence in the said indictment specified, and the Sessions, where the case was tried, adjudged him "for the said misdemeanour to be imprisoned two years, and kept to hard labour." The case was taken by writ of error to the Court of King's Bench, where it was held that the word misdemeanour was *nomen collectivum*, that the finding was in effect that the defendant was guilty of the whole charge in the indictment, and consequently that the judgment was warranted by the verdict. In giving judgment there, Lord TENTERDEN referred to *The King v. Solomons*, (a) where a like judgment on a conviction for the "said offence" had been held good, though the information there charged two offences, each of which would have subjected the defendant to a fine of the same amount as that imposed by the Court in respect of the two offences together. The same principle has been distinctly laid down by the Court of King's Bench in Ireland, in the case of *The King v. Brady*, (b) and in *The King v. Holland*. (c) That principle had been still more fully exemplified in the case of *The King v. Fuller*, (d) where there were two counts; one was defective, the other good, and the Judges being of opinion that one of the counts supported the judgment, it was held sufficient. The rule of the Courts is therefore plain; the practice is established and settled; no one authority can be produced on the other side impeaching it, and any change in it must be effected not by a judgment of this House on a writ of
 * 218 error, but by legislative authority. It is said that * a judgment of this kind does not enable the defendant to plead in any subsequent indictment for the same offence, *autrefois acquit*, or *autrefois convict*. But that is an error: the party so indicted could put in such a plea, and if he proved the identity of the offence in fact, such plea would be supported. The authorities on this subject are all col-

(a) 1 T. R. 249.

(b) 2 Jebb & Symes, 647.

(c) 2 Jebb & Symes, 857.

(d) 2 Leach, C. C. 790; 1 East, Pl. Cr. 92.

lected in Chitty's Criminal Law. (a) The supposed case of hardship is one that never did and never will happen in practice, and cannot therefore afford a good reason for changing a settled rule of proceeding.

As to the supposed confusion between the charges in the counts and the findings on them, it is submitted that there is none. The findings declare the opinion of the jury that all the defendants have been guilty of entering into the general conspiracy, but some of them committed some of the particular acts charged, and some committed others, these acts being each and all directed to effect the common objects contemplated by these persons in entering into the general conspiracy. It cannot be said that finding one man guilty of some of these acts, the same man and another of some others, and a third of all put together, is a finding of three conspiracies. Each separate act is not a separate conspiracy, and therefore a finding of each act is not a finding of so many separate conspiracies. It is merely a finding that all the defendants entered into one conspiracy, the conspiracy charged in the indictment, but that they displayed their activity and zeal in promoting the common objects of the conspiracy by each performing different acts, all of which, however, tended to the same end. The finding is a finding of part of the issue, or it is not: if it is, it will support the judgment, for the jurors are * not bound to acquit all the * 219 defendants if they cannot find all guilty of all the overt acts charged; if it is not, but is more than the issue, it may be rejected as surplusage, but it will not vitiate the judgment. Here the finding is, that the prisoners are all guilty, but not all to the same extent. Lord COKE says, "If the jury give a verdict of the whole issue, and of more, &c., that which is more is surplusage, and shall not stay judgment; for 'utile per inutile non vitiatur;' but necessary incidents required by the law, the jury may find." This rule was acted upon in the case of *The King v. Urlyn*; (b) and

(a) Pages 462-770.

(b) 2 Wms. Saund. 308; see also 2 Hawk. P. C. 441, § 10.

Bacon's Abridgment, (*a*) where many of the cases are collected, states the rule to the same effect.

But assuming (which, however, is not admitted) that some of the findings are bad, still the judgment is not entered upon all the findings, but only on such as are applicable.

[LORD CAMPBELL. — No doubt that may be so in the mind of the Court, but how does the record show that to be the fact?]

The Court would reject such findings, and would pass judgment only on those which are good and which are sufficient to sustain the judgment.

The objection to the finding on the third count is, that it is repugnant, because some of the defendants are found guilty and some not guilty. But where does the repugnancy exist? Is it in the verdict? The answer to the objection is, that the jurors may properly find some of the defendants guilty of some acts, and some of others; and if they do this it will not constitute any repugnancy, for the finding will be according to the fact, and therefore sustainable.

The next objection is, that there being a verdict, as to some of the defendants, of not guilty of attempting
 * 220 * to effect (of the conspiracy) certain acts, they ought to be found not guilty of the conspiracy itself. This objection arises from confounding the acts which are the proof of the conspiracy with the conspiracy itself; and if one conspirator should alone be found guilty of all the acts of the conspiracy, but the existence of the conspiracy itself is proved, the finding is complete, and there must be judgment. There is no one of the defendants acquitted altogether, and there is, therefore, no pretence for entering a verdict of acquittal as to any one. The judgment against him will only be in respect of that part of the charge of which he has been found guilty; but as he has been found guilty of part, no verdict of acquittal can be entered in his favour.

(*a*) Tit. Verdict.

As to the supposed discontinuance, it is submitted that there is no force in that objection. All the cases referred to on the other side are cases of omissions to enter continuances before the verdict, so that it did not appear that the Court continued seised of the case; but in this case it is plain that the Court still continued seised of the case after the verdict and before the judgment; and further, that the defendants were entitled to have no further proceedings taken thereon until the end of the four first days of term, within which they had a right to move for a new trial. On the first day of the term the continuance is duly entered. But suppose the objection to apply to an alleged want of the entry of proper continuances before the trial, then the answer is, that the trial took place under the 1 & 2 Will. 4, the provisions of which statute were duly observed: and at all events, such a frivolous objection could be no ground for reversing the judgment. *Swift v. Nott* (a) is an authority to show that a discontinuance is aided *after verdict. “Be- * 221 tween verdict and judgment there need not be any continuance;” Comyns’s Digest; (b) and *Lakins v. Lamb* (c) is to the same effect. *Rogers v. Allen* (d) and Viner’s Abridgment (e) show distinctly that the want of a continuance after verdict cannot be error in a civil case. Then why should it be different in a criminal case, where the object and purpose of the continuance were exactly the same? Another answer to this objection is, that being mere matter of form, and for the purpose of giving a day for the defendants’ appearance, their appearance cures the objection.

The questions raised here are raised upon the form of the record drawn up for consideration in this House, and do not involve any matter which occurred before the Court of Queen’s Bench in Dublin. But proceeding to those which were there argued, the first that presents itself is that of the challenge to the array. The challenge itself presents no fact on which the Crown could possibly take issue; a demurrer was therefore inevitable. This was an array of a special jury

(a) Siderf. 173.

(b) Pleader (V. 2).

(c) Cro. Car. 235.

(d) Palm. Rep. 233.

(e) Tit. Continuance, B., pl. 3, 4, 5.

under the 3d & 4th Will. 4, c. 91, § 23; which statute regulates the form of striking the jury, and the return. The sheriff is the officer who returns the array. That is important. There is no allegation in the challenge that any of the persons returned were not qualified to serve on juries, nor any challenge that the return is unfairly made, nor that any one single juror returned does not stand indifferent between the parties, nor any averment of any fact on which issue

could be taken to show that the persons making the
* 222 challenge were prejudiced by * this array. Nor is

there any averment that any impropriety has been committed by the sheriff in preparing the array. It must therefore be taken that the array consists of persons qualified and indifferent, and that the sheriff has executed his duty without being guilty of any impropriety. Some of these allegations are absolutely necessary if the array is to be impeached; Co. Litt, (a) where the statement of the law appears to be copied from the Trials *per pais*. (b) If the sheriff is guilty of partiality, the array is to be returned by the coroner; but if the same accusation can be applied to him, then the jurors are to return the array. If the party challenges the array on the ground of favour on the part of the sheriff, he must show the name of the party, and the circumstances on which he relies as proving the charge of favour; and he must do this with sufficient certainty. This has not been done here, and cannot be done. If any of these things had been sufficiently alleged, the Crown might have taken issue on the fact, and triers would have been appointed. No one thing which is necessary to maintain a challenge to the array has been sufficiently alleged here. All the authorities on this matter are collected in Chitty's Criminal Law; (c) Viner's Abridgment, (d) Bacon's Abridgment, (e) and Dyer, (g) are there referred to: all these authorities show that the only grounds of challenge to the array are those which arise on the default or partiality of the officer who made the

(a) 156 b.

(b) 166.

(c) Page 536.

(d) Tit. Triers.

(e) Tit. Juries.

(g) Anonymous, Dyer, 182 b.

return. If wrong names were furnished to the officer, that might have been a ground of challenge to the poll, but not to the array. In the argument on the other side it has been contended that the omission of any names by the * recorder or other person making up the jury-book, is * 223 a ground of challenge to the array. If that was so, the omission of even one name would vitiate the book ; it might be impossible to return a jury. It is said that if the jury-book of one year is wrong, recourse may be had to that of the year before. But can that be the jury-book for the year which has not been made up for the year ? It cannot. The challenge to the array is not the course which ought to have been adopted here. The Attorney-General for Ireland would have violated his duty had he allowed the jury-list to go back to be struck again ; such a proceeding would have been wholly invalid, and the trial afterwards would have been nugatory. The form of the allegations in the challenge is insufficient. The allegation is, that a " certain paper writing," not described as a document required by the Act of Parliament, " purporting to be a general list so furnished to him," that is, by the officers before mentioned, " was illegally and fraudulently made out by some person or persons unknown." The Attorney-General could not take any issue on this allegation. But one of the challenges adds, that it was so fraudulently made up " for the purpose of prejudicing the defendant in this case." What is the meaning of this allegation ? It charges an omission of names by persons unknown ; but it does not charge an omission by the recorder, or the sheriff, or the clerk of the peace, or any of those officers to whom the Act of Parliament has, by name, entrusted the duty of making up the lists, and the jury-book, and the array. On the whole, it is clear that neither in fact nor in law does this challenge allege any thing which entitles the defendants to a challenge to the array. The defendants here might have had all the benefit they sought or were entitled to seek by * this challenge to the array, * 224 had they adopted a challenge to the poll. It is not, however, pretended that the persons impanelled were not impartial. So long as it is not alleged that the sheriff was not

indifferent, it would be extraordinary to say that the whole panel he has returned ought to be quashed. The Act of Parliament has already been construed in the cases of *The Queen v. Fitzpatrick* (a) and *The Queen v. Conrah*, (b) which show that the object of the Act was to prevent persons from being returned who are not properly qualified ; here there is no pretence to say that the persons whose names are on the list are not qualified. In *The King v. Edmonds*, (c) the principle on which challenges to the array must rest is clearly and authoritatively explained by Lord TENTERDEN, whose judgment shows that this challenge to the array will not lie under circumstances such as exist in this case.

As to the swearing of the witnesses, the defendants put in a plea in abatement upon this point. That plea is defective. It alleges that the witnesses were not sworn. That is not a conclusive objection ; they might have been affirmed, and it is not alleged that they were not affirmed. Again, the plea in abatement states that the bill of indictment was found upon the evidence of four witnesses, who were not sworn ; but it does not state who they were, nor does it allege any excuse for not stating that matter. The plea, in that respect, presents no allegation that is capable of being traversed. Further, the plea is also defective in not alleging that there were no other witnesses. As the plea now stands, the indictment may have been found on the testimony of
 * 225 other * witnesses, who were duly sworn or affirmed ; besides, the jurors might have found the bill on knowledge of their own, and they would then, in the language of the law, “ truly present ” it. *The Queen v. Russell*. (d)

Then as to the assignment of errors in fact, which relates to the swearing of the witnesses : this is not a matter for the adjudication of this House.

[LORD CAMPBELL. — There is an assignment of error in fact before the Queen’s Bench ; the error *coram nobis*.]

(a) 1 Craf. & Dix Circ. Cas. 513.

(b) 1 Craf. & Dix Circ. Cas. 56.

(c) 4 B. & Ald. 671.

(d) 1 Car. & M. 247.

That is so: but this House can only look into the record. The error *coram nobis* assigned in the Court below related to matter of practice, into which this House will not examine; besides, there can be no assignment of error in fact of that which may be the subject of a plea in abatement; Comyns's Digest, (a) where it is said that the plaintiff cannot assign error for matter contrary to the record, nor matter that he could plead in abatement; and where many authorities are cited. Bacon (b) lays down the same rule. In *Roe v. Sir J. Moore* (c) it was held that error in fact was not assignable in the Exchequer Chamber. That question again came before the Court, in *Castledine v. Mundy*; (d) and it was held that errors in fact were examinable in the Queen's Bench, but not in Parliament. In *The King v. Woolff* (e) there had been a dispersion of the jury, with the permission of the Judge, during the interval of an adjournment, in the case of a misdemeanour; and the Court of Queen's Bench decided that that did not vitiate the verdict. The case was brought up to this House, but is not reported here. The papers in that case are now * here; and they show that the * 226 question was put to the Judges whether the issue "*in nullo est erratum*" was such an admission of a question of fact as enabled the House to take error in fact into consideration; and the Judges answered the question in the negative.

[LORD CAMPBELL. — If error is assigned and admitted, it does seem monstrous to say that this House cannot take that error into consideration. Where error is assigned *coram nobis*, it must appear on the record, and that would surely give the House jurisdiction.]

Quitting this part of the subject, it is clear that on the proper construction of the Statute 56 Geo. 3, the witnesses were properly sworn. That Act applies to all indictments. Then as to the Act 1 & 2 Vict. c. 37, it is clear that that statute is not confined to the assizes or quarter sessions, but

(a) Pleader (3 B. 16).

(b) Abridg. tit. Error.

(c) Comyns's Rep. 597.

(d) 4 B. & Ad. 97.

(e) 1 Chit. Rep. 401.

applies to the Court of Queen's Bench. *Doe d. Bywater v. Brandling* (a) furnishes a rule for the construction of statutes, which may well be applied here; namely, that the Court will look into every part of the Act to give full effect to the intention of the legislature; and in the opinion delivered here by the Judges this day, (b) that rule is adopted. But besides this, the Court of Queen's Bench in Ireland does fall within the description "Assizes." It is so with the Court of Queen's Bench here. In *The King v. The Justices of Middlesex*, (c) an Act which required something to be done subject to the approbation of the Justices of assize in a county was held to be applicable to the county of Middlesex, as there were Judges of assize in that county; for that the Judges of the Court of King's Bench and Common Pleas bore that character there. This construction is warranted by all the old authorities. (d)

* 227 * As to the form of the indictment: the counts are good and the offences well laid. It has been objected that the charge of the attempt to change the tribunals has not been well alleged: but in *The King v. Mawbey*, (e) where all the authorities are collected, it was held that a combination of parties to do an act may be indictable, though the act, if done by a particular party, might not be so. The mischief is on account of the combination and confederacy, and the rule applies, though the act itself is neither *malum prohibitum* nor *malum in se*. But it is impossible to say that it is not an indictable offence for persons to combine and conspire to bring the Courts of Justice of the country into contempt. The observations of Mr. Justice BULLER, in *The King v. Watson*, (g) are in point on this part of the case. (The learned counsel read them.) The reference to the times of the Star Chamber is not the proper mode of trying this question. Guilt or innocence may consist in degree. An attempt to reform abuses in a tribunal may be made without an attempt to bring all the tribunals of the country into contempt. To

(a) 7 B. & C. 643.

(b) *Sussex Peerage*, ante, p. 85.

(c) 3 B. & Ad. 100.

(d) 4 Inst. 158; Fitz. Nat. Brev. 177 E.; Com. Dig. Assiz. B. 21.

(e) 6 T. R. 619, 628.

(g) 2 T. R. 190.

attempt to shake the confidence of the people in the tribunals, established and maintained by the Sovereign, is clearly an indictable offence ; and any count charging such an attempt charges that which the law will recognize as an offence.

[LORD CAMPBELL. — But must not that charge be taken in connection with the other alleged in the same sentence ; viz., that of substituting other tribunals ? and may not both the alleged purposes be attained by legal means, as, for instance, by Parliamentary authority ?]

That question may be answered in the negative here ; for the count charges that what was done was so done to induce the subjects to withdraw * their differences * 228 from the adjudication of the tribunals, not to induce the authorities to change the tribunals : besides, there is no statement of a combination to get the tribunals changed ; they are to remain, but the combination is to withdraw matter from their recognizance.

[LORD CAMPBELL. — Even then there may be a concurrent jurisdiction given to new and better tribunals.]

Still that is not stated to be done by the lawful authorities, but by the subjects, by means of bringing the existing tribunals into hatred and contempt. Such an allegation is certainly a sufficient allegation of an indictable offence.

Then as to the sixth count : it is objected to this count that it does not describe on whom the intimidation is to operate. It is not necessary that it should do so. In *The King v. Eccles*, (a) it was held that an indictment for a conspiracy to impoverish a man by preventing him from working at his trade need not state the overt acts used to effect the intended mischief ; and Mr. Justice BULLER gives as the reason, that “the means are matter of evidence to prove the charge,” but are not the charge itself. *The King v. Sterling*, (b) *The King v. Gill*, (c) and *The Queen v. Peck* (d) are to the same effect.

(a) 1 Leach, C. C. 274.

(b) 1 Lev. 125.

(c) 2 B. & Ald. 204.

(d) 9 Ad. & El. 686.

The intimidation here was clear ; it was to be directed upon all who were opposed to the purposes of the defendants.

[LORD CAMPBELL. — In the cases referred to the charge was that of defrauding. To defraud must necessarily be interpreted in a bad sense ; to intimidate may be interpreted in a good sense : it may be to defend the law.]

That cannot be so here, for the object alleged is that
 * 229 of an attempt to bring about a change of the * law,
 and to bring it about by means of intimidation. That is the reverse of defending the law.

Then, as to the form of the sentence, so far as relates to giving the recognizances : there is no error in this respect. The defendants may enter into the recognizances at any time they please, and the recognizances will run for that time. The law may impose upon any individual such a condition as that of giving sureties to keep the peace, without any intendment arising that he should be kept in prison for life. If that was not so, no fine could be imposed, for the defendant might refuse to pay the fine, and so would continue in prison ; but that would be his fault, and would be no necessary consequence of the sentence of the law. The date here is objected to as uncertain : that is for the defendants' benefit ; any one of them may make the date certain as to himself whenever he thinks fit. *The King v. Wilkes* (a) is in point. That is not a sentence to enter into recognizances generally, but to enter into them for the space of seven years from the expiration of the twelve calendar months for which he was to be imprisoned. It cannot be assumed that the Court has required unreasonable securities here, any more than it can be assumed that the Court would impose an unreasonable fine. The case where a sentence of recognizances was held irregular is that of *The King v. Collier* ; (b) but there the imprisonment was for a month, unless the defendant asked pardon of the prosecutor, and inserted an advertisement in a public newspaper. The Court discharged the defendant at

(a) 19 St. Tr. 1126.

(b) 1 Wils. 332.

the end of a month, holding the rest of the sentence to be void. In every possible way that case is distinguishable from the present ; for here the imprisonment * is certain, * 230 and the defendants may at any time enter into the required recognizances.

To sum up, therefore, the arguments on these objections, it may be said, that even if one count should be bad, that will not vitiate the whole proceedings. But all the counts are good ; they state acts which are offences in law, for they charge unlawful combinations to effect purposes which, in some instances, are themselves unlawful, and which in all are proposed to be effected by means that are unlawful. The continuances are correct. The challenge to the array cannot be supported. The verdict is not vitiated by there being surplus findings returned by the jury, for these findings may be rejected by the Court. Every one of the defendants being convicted of some part of the charges against him, an entry of acquittal as to him, because he was not found guilty of the remaining charges, would have been erroneous. There is nothing to justify the Court in saying that the witnesses were not sworn, or that the judgment is given on any bad counts, or that the recognizances have been improperly ordered. The judgment of the Court below is warranted by the record and by the verdict, and must therefore be affirmed.

Sir T. Wilde, Mr. Kelly, and Mr. Hill were severally heard in reply. (a)

The Attorney-General did not wish in this case to insist on his right to reply, the more especially as no authorities had been cited for the first time in the arguments just concluded : but on the part of the Crown he protested against what was now done being drawn into a precedent. He was not aware of any criminal case in which the course now adopted had been permitted.

* LORD CAMPBELL.— There is a case of *Lord Dun-* * 231

(a) See *ante*, p. 182 *et seq.*

glas v. The Officers of State, (a) where the Crown was directly concerned, and yet the appellant had the reply.

The Attorney-General. — That is not a criminal case, and cannot therefore be a direct precedent. The counsel for the Crown do not abandon the right to a final reply, but merely waive it in this instance.

The Lord Chancellor stated that he had prepared certain questions to be submitted for the consideration of the Judges. His Lordship read them as follows.

The following were the questions put to the Judges : —

1. “ Are all or any, and, if any, which, of the counts in the indictment bad in law ; so that if such count or counts stood alone in the indictment, no judgment against the defendants could properly be entered up on them ?

2. “ Is there any, and if any, what, defect in the findings of the jury upon the trial of the said indictment, or in the entering of such findings ?

3. “ Is there any sufficient ground for reversing the judgment, by reason of any defect in the indictment, or of the findings, or entering of the findings, of the jury upon the said indictment ?

4. “ Is there any sufficient ground to reverse the judgment, by reason of the matters stated in the pleas in abatement or any of them, or the judgments upon such pleas ?

5. “ Is there any sufficient ground for reversing the judgment, on account of the continuing the trial in the vacation, or of the order of the Court for that purpose ?

* 232 6. “ Is there any sufficient ground for reversing the judgment on account of the judgments of the Court overruling and disallowing the challenges to the array, or any or either of them, or of the matters stated in such challenges ?

(a) *Ante*, Vol. IX., pp. 173, 199 ; see also *Drake v. The Attorney-General*, *ante*, Vol. X., p. 257.

7. "Is there sufficient ground to reverse the judgment, by reason of any defect in the entry of continuances from the said trial to the said 15th day of April, regard also being had to the appearance of the defendants on the said last mentioned day ?

8. "Is there any sufficient ground to reverse or vary the judgment on account of the sentences, or any or either of them, passed on the respective defendants, regard being had particularly to the recognizances required, and to the period of imprisonment dependent upon the entering into such recognizances ?

9. "Is there any sufficient ground to reverse the judgment on account of the judgments on the assignments of error *coram nobis*, or any or either of them, or of the matters stated in such assignments of error, or any or either of them ?

10. "Is there any sufficient ground for reversing the judgment by reason of its not containing any entry as to the verdicts of acquittal ?

11. "In an indictment consisting of counts A., B., C., where the verdict is guilty of all generally, and the counts A. and B. are good, and the count C. is bad ; the judgment being that the defendant for the offences aforesaid be fined and imprisoned ; which judgment would be sufficient in point of law if confined expressly to counts A. and B. ; can such judgment be reversed on a writ of error ? Will it make any difference whether the punishment be discretionary as above suggested, or a punishment fixed by law ? "

* The Judges requiring time to answer these ques- * 233
tions until after their circuits, which were appointed
to commence the next day, the further consideration of the
case was adjourned to the 2d of September.

LORD CHIEF JUSTICE TINDAL. — My Lords, the
answer to the first question will depend upon
the consideration, whether all the counts of the indictment
are framed with that proper and convenient certainty, with
respect to the substance of the charge of conspiracy, which
the law requires ; for, undoubtedly, if any of such counts are

Opinions of the
Judges.

framed in so loose, uncertain, or inapt a manner, as that the defendants might have availed themselves of the insufficiency of the indictment upon a demurrer, there is nothing to prevent them from having the same advantage of the objection upon a writ of error. The crime of conspiracy is complete if two, or more than two, should agree to do an illegal thing ; that is, to effect something in itself unlawful, or to effect, by unlawful means, something which in itself may be indifferent or even lawful. That it was an offence known to the common law, and not first created by the Statute 38 Edw. 1, is manifest. That statute speaks of conspiracy as a term at that time well known to the law, and professes only to be “ a definition of conspirators.” It has accordingly been always held to be the law, that the gist of the offence of conspiracy is the bare engagement and association to break the law, whether any act be done in pursuance thereof by the conspirators or not. *The Queen v. Best and Others*, (a) and *Rex*

v. Edwards and Others. (b) No serious objection appears to have been made at your Lordships’ bar * against the sufficiency of any of the counts prior to the sixth.

Indeed, there can be no question but that the charges contained in the first five counts do amount, in each, to the legal offence of conspiracy, and are sufficiently described therein. There can be no doubt but that the agreeing of divers persons together to raise discontent and disaffection amongst the liege subjects of the Queen ; to stir up jealousies, hatred, and ill-will between different classes of her Majesty’s subjects ; and especially to promote amongst her Majesty’s subjects in Ireland feelings of ill-will and hostility towards her Majesty’s subjects in the other parts of the United Kingdom, and especially in England ; which charges are found in each of the five counts which first occur in the indictment, — do form a distinct and definite charge in each, against the several defendants, of an agreement between them to do an illegal act ; and it therefore becomes unnecessary to consider the other additional objects and purposes alleged in some of those respective counts to have been comprised within the scope of the agreement of the several defendants.

(a) Salk. 174.

(b) 8 Mod. 320.

With respect, however, to the sixth and seventh counts, in the form in which they stand upon this record, we all concur in opinion that they do not state the illegal purpose and design of the agreement entered into between the defendants, with such proper and sufficient certainty as to lead to the necessary conclusion that it was an agreement to do an act in violation of the law. Each of those two counts does, in substance, state the agreement of the defendants to have been "to cause and procure divers subjects to meet together in large numbers, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the * exhibition and demon- * 235 stration of the great physical force at such meetings, changes in the government, laws, and constitution of the realm." Now, though it may be inferred from this statement, that the object of the defendants was probably illegal, yet it does not appear to us to be so alleged with sufficient certainty. The word "intimidation" is not a technical word; it is not *vocabulum artis*, having a necessary meaning in a bad sense; it is a word in common use, employed on this occasion in its popular sense; and in order to give it any force, it ought at least to appear from the context what species of fear was intended, or upon whom such fear was intended to operate. But these counts contain no intimation whatever upon what persons this intimidation was intended to operate: it is left in complete uncertainty, whether the intimidation was directed against the peaceable inhabitants of the surrounding places; against the subjects of the Queen dwelling in Ireland, in general; against persons in the exercise of public authority there; or even against the legislature of the realm. Again, the mere allegation that these changes were to be obtained by the exhibition and demonstration of physical force, without any allegation that such force was to be used, or threatened to be used, seems to us to mean no more than the mere display of numbers, and consequently to carry the matter no further.

Applying the same principle and mode of reasoning to the consideration of the eighth, ninth, and tenth counts of the indictment, we all concur in opinion that the object and pur-

pose of the agreement entered into by the defendants and others, as disclosed upon those counts, is an agreement for the performance of an act, and the attainment of an object,

which is a violation of the laws of the land. We think

* 236 it unnecessary to state * reasons in support of the opinion, that an agreement between the defendants and others to diminish the confidence of her Majesty's subjects in Ireland in the general administration of the law therein ; or an agreement to bring into hatred and disrepute the tribunals by law established in Ireland for the administration of justice, are each and every of them agreements to effect purposes in manifest violation of the law.

Upon the sufficiency of the 11th count, no doubt whatever has been raised.

In answer, therefore, to the first question, we are all of opinion that the sixth and seventh counts of the indictment, and those counts only, are bad in law ; so that if they stood alone in the indictment, no judgment against the defendants could properly be entered up on them.

Upon the second question (*ante*, p. 231), we all agree in opinion that the findings of the jury upon the first, second, third, and fourth counts of the indictment, are not supportable in law. With respect to the first and second counts, — upon the ground that the jury not only find the eight defendants to be guilty of a joint conspiracy charged in each of these counts, but also find a certain number of those eight defendants to have been guilty of separate and distinct conspiracies under the same counts. With respect to the third count, — because they find three of the defendants guilty of a conspiracy to effect all the objects stated ; the rest of the defendants, except Thomas Tierney, guilty of a conspiracy to effect part only ; and Thomas Tierney a still smaller part of the objects mentioned in the third count. And a similar

objection, in point of principle, applies to the findings
* 237 upon the fourth * count, on which all are found guilty of the whole of the charge, except Mr. Tierney, who is found guilty of part only. And the reason and ground for such opinion is this : That as each count of the indictment charges one conspiracy or unlawful agreement, and no more

than one, against all the defendants in such count, so the jury could find only one conspiracy or unlawful agreement on each separate count; for though it was competent to the jury to find one conspiracy on each count, and to have included in that finding all or any number of the defendants, yet it was not competent for them to find some of the defendants guilty of a conspiracy to effect one or more of the objects stated, and others of the defendants guilty of a conspiracy to effect others of the objects stated; because that is, in truth, finding several conspiracies, on a count which charges only one. The case of *The King v. Hempstead* (a) is strong in support of this principle, when applied to the case of larceny. The indictment contains one charge: the jury cannot find more than one.

We therefore agree that the findings of the jury on the first four counts of the indictment are not authorized by law, and are incorrectly entered upon the record.

The third question (*ante*, p. 231) does, to a very considerable extent, comprise the same points of inquiry as those which form the subject of the eleventh question put to us by your Lordships; and as there is a difference of opinion amongst the Judges, I beg to inform your Lordships that it is my own opinion only that I now offer in answer to this question. In order to arrive at a satisfactory answer to this question, it appears to me necessary to consider it as divided into two separate * parts; namely, first, whether in the case of * 238 an indictment consisting of several counts, upon which there has been a verdict with proper findings, and a general judgment against the defendants, such judgment shall be reversed by reason of the defect or insufficiency of one or more of the counts? And secondly, upon the supposition that all the counts are good, but the findings of the jury defective as to some of them, whether a reversal of such judgment shall take place by reason of such insufficient findings? And in answer to the first branch of this inquiry, I conceive it to be the law, that in the case of an indictment, if there be one good count in an indictment, upon which the

(a) R. & R. Cro. Cas. 344.

defendants have been declared guilty by proper findings on the record, and a judgment given for the Crown, imposing a sentence authorized by law to be awarded in respect of the particular offence, that such judgment cannot be reversed by a writ of error, by reason of one or more of the counts in the indictment being bad in point of law. In a civil action indeed, if the same state of facts be supposed; that is, one count in the declaration good in law, and others bad; a verdict finding general damages against the defendant upon all the counts; and a judgment upon the whole record for the plaintiff; the whole judgment would undoubtedly be reversed upon a writ of error, and a *venire de novo* awarded.¹ Because, in that case, the judgment is for damages, which are given as well upon the bad count as the good; the jury having no power to find a verdict for the plaintiff upon any one count, without finding, in contemplation of law, some damages also upon that count; so that the whole amount of the damages found must be the aggregate of the separate sums

found upon the good and bad counts together, and the

* 239 Court cannot see how much * arises from the good count and how much from the bad. Of necessity, therefore, and to do justice between the parties, and in order to ascertain the real damages sustained by the plaintiff upon the good count, the judgment must be set aside. No judgment of a Court can be given on an uncertain verdict; and the verdict becomes uncertain the moment the damages or any part of them are referrible to a bad count. But this rule has always been thought productive of great inconvenience even in civil cases, and has been described by Lord MANSFIELD "as so inconvenient and ill-founded a rule, that he exceedingly lamented it should ever have been established." (a) And in another case, the same eminent person draws the distinction between civil suits and criminal proceedings, laying it down broadly, "that in criminal cases the rule is, that if there is any one count to support the verdict

(a) *Grant v. Astle*, Dougl. 730.

¹ See *Glamorganshire Canal Co. v. Blakemore*, 1 Cl. & Fin. 262, 276 and note (1).

it shall stand good, notwithstanding all the rest are bad ;” (a) a distinction which had already been laid down by the Court of Queen’s Bench in the case of *Rex v. Benfield and Another*, (b) “ that the reason of the rule which obtains in civil actions does not hold in indictments or informations ;” and “ that if part of the charge in one of the counts had not been the ground of an indictment, it would only go towards lessening the punishment, and would not be a sufficient reason for arresting the judgment.” Indeed it is manifest, without looking for any authority for the purpose, that there is no analogy whatever between the two cases. In criminal proceedings the jurors have no other question before them than whether the prisoner is guilty or not guilty of the charge in the indictment ; no other duty to perform but that * of pronouncing him to be the one or the other. They * 240 have no concern whatever with assessing or awarding the punishment. It is the province of the Court to pass sentence on the whole or on part of the record as the law requires ; either a fixed punishment, if any statute has so directed, or if a discretionary punishment is given by law, such measure of punishment as under the particular circumstances the defendant ought to receive. The uncertainty and confusion which arise in civil suits, from a general verdict in a civil action where one of the counts cannot be supported, can never arise in a criminal proceeding. There is one count that is good, one verdict upon which the defendant is found guilty, and one sentence of the punishment awarded by law ; either a certain punishment, or a discretionary punishment, according as the one or the other is called for by the law ; but where discretionary, a punishment fixed and ascertained by the Judge who tried the cause, or by the Court of King’s Bench, before which Court the defendant is brought to receive his sentence.

In the nature of the thing itself, therefore, there seems no reason or principle upon which the judgment in a criminal case should be reversed upon a writ of error, by reason of the

(a) *Peake v. Oldham*, Cowp. 275.

(b) 2 Burr. 986.

defectiveness of one count. In cases of felony, where the indictment contains several counts, — a proceeding altogether unknown to ancient times, — it is well known in practice that the various counts have been introduced, not for the purpose of charging the prisoner with divers and distinct felonies, but for the purpose of meeting any difficulty which might arise on the trial from the misdescription of the offence in a single count. An example of daily re-

currence will make the point clear: in an indictment

* 241 for cutting and wounding, under the Statute * 1st

Vict., c. 85, the indictment ordinarily contains two counts at the least; one stating the intent to have been to disable, another to do grievous bodily harm. But the only object of the prosecutor in making this double statement is, that as the charge may take a different complexion and character from the evidence at the trial, the chance of the offender's escape by the misdescription of the offence may be avoided. In no case, however, was it ever known in practice that the two counts of the indictment contained two different charges of felonious cuttings and woundings; but one *corpus delicti* only, under two different descriptions. And if the prosecutor in any charge of felony should offer evidence tending to prove two distinct charges of felony, he would be stopped immediately by the presiding Judge, and directed to make his election upon which single charge of felony he intended to proceed. Now, suppose in the case last put, of the two counts for the same offence, a general verdict of guilty, a sentence of imprisonment with hard labour for twelve calendar months (which is a discretionary punishment), and after the sentence passed, it should be discovered that one of the counts in the indictment was defective, in consequence of the omission of some necessary averment, and a writ of error should be brought; it would surely be against all principle both of law and reason (for as to any decision in support of such a doctrine, none can be found) that the judgment should be reversed, and the party who had been convicted on the indictment discharged from all punishment for his offence.

It must, indeed, be conceded, that the practice in the case

of a prosecution for a misdemeanour, so far differs from that in a prosecution for felony, that there may be (though it is not usually the case) several counts * for distinct * 242 offences contained in one and the same indictment. In that case, the prosecutor is not always put to his election, as in the case of felony; but the trial may proceed, and the sentence may be passed, for several offences distinct from each other. But the consequences, so far as relates to the present subject of inquiry, appear to be the same, both in the charge for felony and the charge for misdemeanour. The moment the discretionary punishment is pronounced by the Judge, whether it be upon a single offence described differently in various counts of the indictment, or for divers and distinct misdemeanours charged in different counts, that discretionary punishment, so awarded by the Judge, stands in the place of the fixed punishment in the case of the felony. And the Court of Error has no more right to presume or to intend that any part of the discretionary punishment in the case of misdemeanour, has been awarded in respect of an insufficient count, than in the case of felony to presume that the fixed punishment has been given upon a defective count, where there is a valid count to support it.

It was urged at your Lordships' bar, that all the instances which have been brought forward in support of the proposition that one good count will support a general judgment upon an indictment in which there are also bad counts, are cases in which there was a motion in arrest of judgment, — not cases where a writ of error has been brought. This may be true; for, so far as can be ascertained, there is no single instance in which a writ of error has been ever brought to reverse a judgment upon an indictment upon this ground of objection. But the very circumstance of the refusal by the Court to arrest the judgment, where such arrest has been prayed on the ground of some defective * count * 243 appearing on the record, and the assigning by the Court, as the reason for such refusal, that there was one good count upon which the judgment might be entered up, affords the strongest argument that they thought the judgment, when entered up, was irreversible upon a writ of error.

For such answer would not otherwise have been given: it could have had no other effect than to mislead the prosecutor, if the Court was sensible at the time that the judgment, when entered up, might afterwards be reversed by a Court of Error. It is surely impossible that the Judges could have pronounced the opinion in *The King v. Fuller* (a) if they had not been fully satisfied that the objection was unavailable in any stage of the proceedings.

It has been objected, however, on the part of the plaintiffs in error, that to allow the judgment to stand, whilst there remained a defective count upon the face of the record, would expose the defendants to some hardship or inconvenience. And the two instances which have been advanced in argument, have been, first, the difficulty of availing themselves of the judgment upon the present indictment, as a bar to a second prosecution for the same offence; and, secondly, the possible difficulty of availing themselves of a pardon granted as to the offence contained in one of the counts of the indictment. If either of these consequences should really follow from holding the present judgment to be irreversible, I should pause long before I adopted the conclusion at which I have at present arrived. But I cannot, upon the best consideration, bring myself to the opinion that any such difficulty really exists. For as to the plea of *autrefois convict*, in what-

* 244 ever form the judgment is entered up * on the first indictment, whether generally upon all the counts of the indictment, or specially on the good count only, it is not a circumstance which would in any way affect the defendants' security. The question upon the plea of *autrefois convict* would not turn upon the frame of the former indictment or judgment, but upon the identity of the present offence for which the defendants were then upon trial, with the offence for which they were formerly tried and convicted. It would be a question of evidence only, whether the *corpus delicti* was the same in both cases; for undoubtedly the former conviction, however entered up, would be a valid conviction until reversed by a writ of error. And as to the objection that a difficulty would be thrown upon the defendants, in

(a) 1 Bos. & Pull. 184.

case a pardon should be granted with respect to the offences contained in those counts which were confessedly valid, and not extending to the offences in the other counts, it may be answered, that no instance can be found of a pardon granted after a judgment which does not recite the indictment and the conviction; indeed, in the case of felony, the pardon would be void without such recital; (a) and if it is possible to suppose the case to happen, that after such recital the Crown should pardon not the whole of the offence in the indictment, but the offence contained in the valid counts only, there can be no doubt whatever but that the Court before whom the prisoners were brought to take the benefit of the pardon would discharge them altogether, when nothing appeared excepted from the pardon but the offences described in counts untenable in law. I do not, therefore, see any objection, on reason or principle, to the holding, as I conceive the law to be, that the judgment proceeds, in the case supposed, upon the good count in the indictment, and upon the * good count only; and there is certainly no * 245 authority against this position. The inference to be drawn from the case of *Young and Others v. The King* (in error), (b) is strong in support of this doctrine; and if the judgment proceeds upon the good count only, the whole difficulty is at an end.

My Lords, with respect to the second branch of inquiry under this third question, it will not be necessary to trouble your Lordships at any length. The effect of a bad finding upon a good count is in reality the same as no finding at all. If the finding is not such as to be sufficient to connect the defendants with the offence charged in any particular count, the effect, as to them, must be the same as if such count did not appear in the indictment. A bad finding on a good count, and a good finding on a bad count, appear to me to stand upon the same footing with respect to the validity of a judgment signed generally on the whole record; that is, that in legal presumption, no part of the judgment can be held to rest upon the one or upon the other.

(a) 2 Hawk. P. C., c. 87, § 8.

(b) 3 T. R. 98.

And for these reasons, I offer it as my humble opinion, in answer to the third question, that there is no sufficient ground for reversing the judgment by reason of any defect in the indictment, or of the findings, or entering of the findings, of the jury upon the said indictment.

To the fourth question (*ante*, p. 231), I am requested by my brethren to say that we all agree that the judgment ought not to be reversed by reason of the matters stated in the pleas in abatement, or the judgment thereon. It appears to be sufficient to say, that the law requires a plea in abatement, which is a dilatory plea, to be pleaded with certainty, (a) or, as it is expressed, (b) * “with precise and strict exactness,” or, as it is laid down in *Chetham v. Sleigh*, (c) “it ought to be certain to every intent;” and as this is the rule in a civil action, at least the same degree of precision and strict exactness is necessary in a plea in abatement to any proceeding at the suit of the Crown. But in the present case the plea fails in precision in many particulars. The names of the unsworn witnesses upon whose evidence the bill is alleged to have been found are not given in the plea; there is no averment that the bill was not found upon the evidence of other witnesses who were sworn, besides those who are alleged to have been examined without being sworn; and lastly, for any thing that appears to the contrary in the plea in abatement, the four witnesses upon whose evidence the bill was found a true bill, might have been authorized by law to give their evidence upon affirmation instead of upon oath. The pleas consequently are bad.

The facts upon which the fifth question (*ante*, p. 231) arises are these: The *venire* was made returnable on the 15th of January; the cause was therefore properly continued until that day, being a day in Hilary term. Before the arrival of that day, however, the Court made an order that the issues joined should be tried at the bar of the Court; which must be understood to be a trial upon the 15th of January, the day for which the jury were summoned, and

(a) Co. Litt. 303.

(b) Lutw. 14.

(c) 1 Lev. 67:

which indeed appears conclusively to be the day fixed for the trial, from the terms of the order itself. But before that day arrives, namely, on Saturday, the 13th of January, the order is made by the Court (*a*) which is the subject of the present question. The objection taken is, that the order is conditional only, and that it is not for the appointment but * for the continuation only of the trial. But the order * 247 appears to us to be clearly within the scope and intention of the Act, and to be well warranted by the powers thereby conferred on the Court. The statute warrants the Court in appointing such day or days as it shall think fit; and the condition, as it is termed, upon which this particular order is made is not a condition precedent, so as to make it uncertain whether the Court intended to exercise the power or not, but merely a condition implied in the very nature of an absolute appointment; namely, a condition that it would not be used if found unnecessary. If the Court had appointed four days for a trial at bar, and added the words, "if the same shall be necessary for that purpose," no one could reasonably object that this condition imported any extension of the powers given by the Act; and the order made in the present case in effect imports no more. And as to the appointment being made for the continuation of the trial only, a power to make such order is necessarily included within the authority given by the statute. If the Court may appoint the whole trial in vacation, may it not so appoint part likewise? "Omne majus continet in se minus." The trial, therefore, appears to have been properly continued in vacation, and the order was sufficient for that purpose; and it is the opinion of all her Majesty's Judges that this question is to be answered in the negative.

The answer to the sixth question (*ante*, p. 232) will depend upon the principle on which the law allows a challenge to the array of the panel of a jury. The only ground upon which the challenge to the array is allowed by the English law is the indifference or default of the sheriff. But no want of indifference in * the sheriff, nor any * 248

(*a*) See *ante*, p. 166.

default in him or his officers, was assigned for the cause of challenge upon this occasion.

The array of the panel is challenged in this case upon the ground that the general list from which the jurors' book is made up had not been completed in every respect in conformity with the requisites of the statute, but that, on the contrary, the names of fifty-nine persons duly qualified to serve on the jury for the county of the city of Dublin were omitted from the general list, and from the special jurors' book of the said county ; but the challenge contains no accusation against the sheriff or any of his subordinate officers. The challenge by each of the defendants alleges indeed, " that a list purporting to be a general list was illegally and fraudulently made out, by some person or persons unknown ; " and the challenge by Mr. Steele states further, " that the names were left out for the purpose and with the intent of prejudicing the said Thomas Steele in this cause, by some person or persons unknown ; " but neither in the one case nor in the other is there the most distant suggestion that the sheriff is in fault. The sheriff, therefore, being neither undifferent nor in default, the principle upon which the challenge to the array is given by law does not apply to the present case. The statute has, in fact, taken from the sheriff that duty of selecting jurymen which the ancient law imposed upon him, and has substituted instead a new machinery, in the hands of certain officers, by whom the list is to be prepared for the sheriff's use. If the sheriff, when the jurors' book was furnished to him, had acted improperly in selecting the names of the jury from the book, such misconduct would have been a good cause of challenge to the array ; but that which is really complained of is, that the material of the book out of which the jury is selected by the sheriff, and for

* 249 which the sheriff is not * responsible, has been improperly composed. It is not, therefore, a ground of challenge to the array. And further, it is manifest that no object or advantage could have been gained if the challenge had been allowed ; for if the challenge had been allowed, the jury process would have been directed to some other officer, who would have been obliged to choose his jury out of the very

same special jurors' book as that which the sheriff had acted on, for no other was in existence. The same objection might again be made to the jury panel secondly returned, and so *toties quoties*; so that the granting of this challenge would, in effect, amount to the preventing the case from being brought to trial at all. The very same difficulty might occur in England, if, through accident, carelessness, or design, a single jury-list, directed to be returned by the overseers of any parish within the county, were not handed over to the clerk of the peace, or if a single name should have been omitted in any list actually delivered to the clerk of the peace. The jury-book must necessarily, in either case, be deficiently made up. But if such deficiency were allowed to be a ground of challenge to the array, the business of every assize in the kingdom might effectually be stopped. That there must be some mode of relief for an injury occasioned by such non-observance of the directions of an Act of Parliament is undeniable; but the only question before us is, Whether it is the ground of challenge to the array? and we all agree in thinking it is not, and therefore we answer this question in the negative.

As to the seventh question (*ante*, p. 232): The only mode of continuing a cause after the return of the jury process is, either by an adjournment to a future day, if the Court should not meet for business on the day previously fixed, or by an entry of *Cur. adv. vult*, if the * Court should * 250 meet to give judgment, but should require time for further consideration. (See instances in 1 Report); (a) nor has the law provided itself with any other form of continuance in that stage of the cause. The question, therefore, is, Whether either of those forms is applicable to the present case, as it then stood? The case stood under very peculiar circumstances. A trial at bar had taken place in vacation time, under the Statute 1 & 2 Will. 4, c. 31. But that statute enacts, that the time appointed for the trial at bar, if in vacation, "shall, for the purpose of such trial, be deemed and taken to be a part of the preceding term." It was to be a

(a) Case of Alton Woods, 1 Co. Rep. pp. 87, 88.

day in term for the trial, not a day in term for the giving of judgment, or any other purpose. It is obvious, therefore, that neither of the forms of continuing the cause in Court, which are above adverted to, could apply to a cause so circumstanced. An adjournment of a Court which was constituted for trial only, after the trial was completed, to the first day of the ensuing term, when the Court would by law sit for other and different purposes, would be absurd on the face of it; and an entry of *Curia adv. vult*, by a Court which had never met and never could meet to give judgment, would be equally unreasonable. The same answer applies to the want of a *dies datus*, as objected to at your Lordships' bar. It never could be the intention of the statute that all proceedings should cease and become useless in matters both civil and criminal, by reason of the impossibility introduced by the statute itself of complying with that requisition of the common law that the cause should be kept alive by a continuance from term to term; and the question, therefore, is, whether the statute itself does not, by its own necessary operation, continue the cause over to the following

* 251 term? * We think such is the necessary operation of the statute, and that, under the circumstances which took place, there was, in effect, a Parliamentary continuance of the cause. In the view of the case which we entertain, we think there is no occasion to consider whether a discontinuance would or would not have been cured by the appearance of the defendants on the 15th April, because we all concur in opinion that no discontinuance did in fact take place.

As to the eighth question (*ante*, p. 232): We see no ground for varying the judgment on account of the sentences. The only difficulty that has been suggested on this part of the case, arises upon the form of the order for entering into the recognizance, with respect to the time at which the term of seven years is to commence. The question is, whether such order is against the law; no other question can be raised upon a writ of error. There is nothing upon this record to show that the recognizance ordered is illegal; for unless it appears that it would be manifestly unreasonable, as to the sum fixed, or as to the time for which it is required,

under any possible state of circumstances, a Court of Error has no authority to interfere. The defendants have under this sentence the power to enter into the recognizances *instantly*, and thereby shorten the term for the suretyship to six years after the imprisonment has ended; and it is to be presumed, that when this sentence was passed, the Court below formed a proper judgment of the situation, means, and circumstances of the several defendants, so as to enable them to provide sureties in the amount directed.

The argument of Lord Chief Justice WILMOT, in *Wilkes v. The King* (in error), (a) is strong to show there can be no illegality in an order for a recognizance * to * 252 commence after a term of imprisonment which is in itself uncertain, being dependent on the payment of a fine; and this goes far to remove any question as to the illegality of the present order.

We all agree, therefore, in thinking the eighth question proposed by your Lordships is to be answered in the negative.

As to the ninth question (*ante*, p. 232): The errors in fact assigned in the writs of error *coram nobis* by each of the defendants (except Thomas Steele) were the same; viz., that the bill of indictment was found and returned a true bill by the grand jury, upon the evidence of divers witnesses, whose names are enumerated, and of no other persons; and that these witnesses, previous to their examination before the grand jury, were not sworn in the Court of Queen's Bench, as required by the 56th Geo. 3, c. 87; nor lawfully bound, by affirmation or declaration, to give true evidence before the said grand jury. In the case of the writ of error *coram nobis*, brought by the defendant, Thomas Steele, the error assigned was this, that the indictment was not found in the manner required by the Statute 1 & 2 Vict. c. 37, inasmuch as that, in stating on the back of the said alleged bill of indictment the names of witnesses who had been sworn, &c., neither the foreman nor any other member of the grand jury did authenticate by his signature or initials, as is required by the

(a) Wilmot's Notes of Opinions and Judgments, 322.

statute, that the said witnesses, or any of them, had been sworn, or made affirmation or declaration ; nor that no other witnesses, save those named in the assignment of errors, were so sworn or affirmed, or examined before them.

My Lords, with respect to the assignment of errors in fact, grounded on the non-compliance with the Statute 56
 * 253 Geo. 3, the answer appears to us to be, that * the subsequent Statute 1 & 2 Vict. c. 37, operates as a virtual repeal of the former, as well in the Court of Queen's Bench as in other Courts of Criminal Jurisdiction in Ireland.

If the question had been *res integra*, a doubt might, perhaps, have been entertained, upon the construction of the statute, whether the Court of Queen's Bench and the Commission Court of Dublin had not been omitted in it by mistake. We know, however, that the judgment of the Irish Judges, from the time of passing the Act, after deliberate consideration, has in several instances declared the practice which is now objected to, to be in conformity with the law, and that the practice of swearing witnesses has been in accordance with such opinion of the Judges ; and as there are, undoubtedly, words in the statute which will well warrant this construction, we think such decision of the Irish Judges ought to be supported.

The later statute recites the Act 56 Geo. 3, which applies in terms to the returning bills of indictment by "any grand jury in Ireland," and then recites the inconvenience by the administration of the oath in Court ; that is, in terms as general as the former, in every Court in the kingdom. From the preamble, therefore, it might well be expected that the alteration about to be enacted would be general and without exception ; the enacting words are accordingly, "that in all cases where bills of indictment are to be laid before grand juries in Ireland for their consideration, the clerk of the Crown at the assizes, and clerk of the peace at quarter sessions, shall make the indorsement thereon directed. To give this enactment its full force, that is, to make it apply to all cases, those particular officers must be held to be named only
 in the way of examples or instances of the proper
 * 254 officers, * in those particular Courts, who are to make

the indorsement; not to be named by way of restraining the general application of the statute to those Courts only, where the officers of that precise description are found. It certainly would be a very singular and anomalous mode of introducing a restraint upon the general words of a beneficial and remedial Act.

The clerk of the Crown in the Court of Queen's Bench, and the clerk of the Crown at the assizes, hold offices and perform duties that are perfectly analogous to each other; and this construction receives further confirmation by the enactment in the same section, that the oath or affirmation directed by that Act is not to be in addition to, "but in lieu of that heretofore administered in Court, under the provisions of the said Act passed in the 56th Geo. 3;" words that necessarily import the oath is no longer to be given at all, under the former statute.

And to show the little force attributed by the legislature to the expression "clerk of the Crown at the assizes," in the former part of the section, it is directed in the latter part of the same section, that the foreman of the grand jury shall not have power to examine any witness in support of a bill, whose name shall not have been previously indorsed on such bill of indictment, by the "clerk of the Crown (not clerk of the Crown at the assizes) or clerk of the peace respectively."

Upon a reasonable construction of the statute, we therefore think this ground of objection is removed.

And with regard to the error in fact assigned by the defendant, Thomas Steele, it is manifestly founded on a part of the section that is directory only, and not essential. The oath must have been already administered (which is the essential part of the enactment) * before: in the * 255 language of the statute, "the foreman who shall have administered the oath" is directed to state the names of the witnesses sworn, and to authenticate the same by his signature or initials; that is, before the objection above made can possibly arise. As a matter of convenience at the trial, in order to ascertain at a glance whether the witness examined before the Crown jury was one of those who appeared before

the grand jury, such direction ought undoubtedly to have been complied with; but it cannot be the law, that after the witness has been duly sworn and examined, and the bill returned a true bill upon his evidence, it can be deprived of its legal operation and character by reason of the foreman of the grand jury having neglected to comply with such direction of the statute. The ninth question, therefore, we all concur in opinion must also be answered in the negative.

As to the tenth question (*ante*, p. 232): After causing search to be made in the Crown-office, no instance can be found of such an entry, where the party is found guilty of any part of the indictment on which he receives judgment; and we think such practice is in conformity with the law. For it appears from Lord HALE, (*a*) that the acquittal by the jury regularly is a warrant for entry of the judgment at any time afterwards; so that the judgment *quod et sine die* may be entered by the Court below on the application of the defendant, even after the time the writ of error is brought. We are all of opinion, therefore, the tenth question is to be answered in the negative.

Upon the last question (*ante*, p. 232), I consider that

* 256 I have, in answer to the third question, already * anticipated those observations which would otherwise have applied themselves to the present. I have stated the opinion at which I have arrived to be, that a general judgment upon the whole record is not to be reversed upon a writ of error, by reason that one or more of the counts are bad, and the remaining counts good, and the verdict has been a general verdict of guilty: and I have also stated my opinion, that it would make no difference in this respect that the punishment is a discretionary punishment. The only part of this question remaining to be considered, is whether the entry upon the record, being "that the defendant for the offences aforesaid be fined and imprisoned," be of itself a ground of reversal.

The exact expression upon the record to which our attention has been directed is, that the defendant, "for his offences

(a) 2 Pl. C. 243.

aforesaid, be fined and imprisoned ;” and as I presume your Lordships wish us to consider the question with reference to that record, I proceed to answer the question as if it stated the sentence in the latter form.

I interpret those words, in their plain literal sense, to mean, “such offences as are set out in the counts of the indictment which are free from objection, and of which the defendant is shown by proper findings on the record to have been guilty ;” that is, in effect, the offences contained in the fifth, the eighth, and all the subsequent counts. And I see no objection to the word “offences,” in the plural, being used, whether the several counts last enumerated do intend several and distinct offences, or only one offence described in different manners, in those counts. For whilst the record remains in that shape, and unreversed, there can be no objection, in point of law, that they should be called “offences,” as they appear on the record. * If the words had been for his * 257 “offence aforesaid,” then the objection would have taken the same form as that made in *The King v. Powell*, (a) and it would have been urged that there were more offences than one upon the record ; and it might perhaps have been difficult to sustain the statement, by reason of the word offence being *nomen collectivum*.

I therefore think, but I offer it as my own opinion only, that this, the eleventh question, is to be answered altogether in the negative.

MR. JUSTICE PATTESON. — My Lord Chief Justice having delivered the joint opinion of her Majesty’s Judges, as to all the questions proposed by your Lordships, except the third and eleventh, I proceed to give my humble opinion upon those questions.

The third question appears to me to consist of two parts : the first, regarding the consequence of any defect in the indictment itself ; the second, regarding the consequence of any defect in the findings of the jury upon the trial.

With respect to the first, I will take the liberty of answer-

(a) 2 B. & Ad. 75.

ing it together with the eleventh question, which I conceive to be in effect the same; for the only defect in the indictment is that two of the counts, namely, the sixth and seventh, are bad.

With respect to the second, viz., the consequence of the defects in the findings of the jury, I am of opinion that those defects, so far as they relate to the fourth count, are cured by the entry of a *nolle prosequi* as to the defendant Thomas Tierney.

As regards the first and second counts, I am of opinion that there is not any sufficient ground for reversing the
 * 258 judgment by reason of the defects in * the findings of the jury, or the entering of those findings, upon those counts. I apprehend that it was competent to the jury to find the defendants guilty of a conspiracy to do part of the things stated in those counts; and that there is no variance between the conspiracy so found and that laid in those counts, although the latter contains also other matters. This seems to have been established in principle in the case of *Rex v. Hollingberry and Others.* (a)

The jury, then, having found all the defendants guilty of a conspiracy to effect part of the objects stated in the first and second counts, which finding is sufficient to sustain the judgment, all the rest of the finding, although wrong, appears to me to be mere surplusage and inoperative. Having found all the defendants guilty of a conspiracy which was described in those counts, the jurors had performed their office; and in proceeding to add that some of the defendants were guilty of another conspiracy (even though that finding, if it had stood alone, might have been sustained), they have acted without any jurisdiction, and that part of their finding must be rejected. The finding upon the third count I consider to be a verdict of guilty against three of the defendants for a conspiracy to effect all the objects charged in that count; and that, in substance, it is a finding of not guilty as to all the other defendants. It might have been more in accordance with the evidence, or more correct, to have found, as upon the first

(a) 4 B. & C. 329.

and second counts, all the defendants except Tierney guilty of a conspiracy to effect all the objects stated in the count, except the exciting disaffection in the army; yet I think that the judgment cannot be reversed for the defective finding, but that all the finding after that * of guilty * 259 against three of the defendants, must be rejected as surplusage.

If, however, this view of the case should be wrong, still I am of opinion that the bad findings can have no other, either greater or less effect, than the badness of the counts would have had; which is, that any judgment which necessarily rested upon those counts would be erroneous. This part of the third question, therefore, would, at most, only become identical with the other part of the same question, and with the eleventh question, which I now proceed to consider.

The eleventh question is one of very general application, and may arise in many cases in the course of the administration of criminal justice.

It seems to be argued upon this question, that there is so strict an analogy between a general verdict for damages in a civil action, where the declaration contains several counts, and a judgment upon an indictment which contains several counts, as that a Court of Error must act upon such analogy, and apply the same rule in criminal cases as is usually applied in civil cases; viz., that one bad count is fatal to the judgment, not on that count, but on the good ones. That rule has been considered as a very inconvenient and bad rule, by Lord MANSFIELD on several occasions, *Grant v. Astle*, (a) *Peake v. Oldham*, (b) and other cases, in which, as in that of *Rex v. Benfield and Another*, (c) the same learned Judge stated that the rule did not apply to indictments. Whether the rule is good or not, it is plain that in civil actions it is founded on the impossibility of the Court, whose duty it is to pronounce judgment, being able to ascertain what judgment to * give. The verdict of a jury, in order * 260 to have its full effect, must be followed by a judgment

(a) 1 Doug. 730.

(b) 1 Cowp. 276.

(c) 2 Burr. 980.

of the Court; and if that verdict be uncertain, the Court cannot pronounce judgment at all. When a declaration contains several counts claiming damages, the jurors must give some damages upon every count which they find in favour of the plaintiff; and if they do not apportion the amount of the damages separately to each count, and one be bad, it is obvious that the verdict becomes immediately uncertain, and no judgment can be pronounced; not for the whole damages, because it is plain that as to some part the verdict is wrong, but as to what part the Court cannot tell, and therefore cannot give judgment for part;¹ the judgment must therefore either be arrested, or a *venire de novo* awarded. *Lewin v. Edwards.* (a) But in criminal proceedings, the jurors merely find the party guilty or not guilty; they have nothing to do with the punishment, or with any thing at all analogous to assessment of damages in civil actions. The Court is free to give judgment on the whole, or on part of the indictment, as the law may require, and no uncertainty can arise; therefore the reason for the rule in civil actions does not and cannot apply to criminal cases.

But if, on general principles and rules of law, a general judgment on an indictment consisting of several counts, on all which the defendants are found guilty, must be taken to apply in part to each count; and if the sentence pronounced is to be taken as the aggregate amount of several separate sentences, one on each count, then the analogy may hold, though the reason of the rule does not apply.

I believe that this is the first time that any such no-
 * 261 tion has been suggested. Certainly, the practice of * all criminal Courts, has been to pass sentence generally in all cases of felony, whatever number of counts may be contained in the indictment; but then there is really but one offence, for although two or more distinct felonies may be joined in one indictment, yet in practice the prosecutor is usually put to his election to proceed on one only.¹ I am not aware of any instance in which a writ of error, in a case

(a) 9 M. & W. 720.

¹ *Ante*, 238.

of felony, has been brought on account of there being one bad count in the indictment. So in indictments for misdemeanours, if there is really more than one offence contained in the indictment, the prosecutor is not usually, as in felony, put to his election, but the defendant may be convicted for several offences. If he should be so convicted, it is most usual to pass sentence separately for each offence; that is, to give judgment separately, not on each count, but, so to speak, on each class of counts, treating them as if they were separate indictments. That course, however, is not always pursued; but one sentence is sometimes passed, where no greater punishment is inflicted than might be under any one of the counts, if it stood alone. If there be in truth only one offence, stated in various ways, the sentence is, I believe, invariably general. The universally received opinion has been, that one good count would sustain such general judgment. Lord MANSFIELD, in the cases I have alluded to, distinctly states it to be so, and no decision or *dictum* is to be found in the books the other way. . Motions in arrest of judgment have, indeed, been made on account of the indictment containing one or more bad counts; but the Courts have always refused the motion, and said that it was immaterial, as there was one good count. *Rex v. Rhodes and Another.* (a) It should * seem that in such in- * 262 stances the Courts must have proceeded to give judgment in the general form commonly used, without confining it to the good count, because, having refused the motion, they have not even determined whether the count objected to was bad or not; and yet no one ever thought of bringing a writ of error upon such judgment. No instance of such a writ of error is to be found. When there is a doubt at the assizes as to questions of the sort, judgment is usually res-pited; and when that is done, nothing can be inferred as to the present point. But there is one case, *Rex v. Hill*, (b) in which sentence was passed at the assizes for a misdemeanour, and afterwards certain points were submitted to the Judges, who held that one of the counts was bad; yet as

(a) 2 Ld. Raym. 886.

VOL. XI.

(b) Rus. & Ry. Cro. Cas. 190.

15

[225]

the rest were good, it did not occur to them to recommend a pardon, which they ought surely to have done, if the sentence or judgment was reversible by writ of error. Looking at any record of conviction where there are several counts, and a general verdict of guilty, and a general judgment, a Court of Error cannot indeed tell whether, in point of fact, more than one offence was proved or not; and it may be assumed, for the purpose of this argument, that such Court is bound to suppose that as many offences as there are counts were proved. Yet, if the sentence be such as might be passed on any one count, there is no reason why the Court of Error should not consider that the Court below has passed sentence on all the counts indeed in point of form, but applied the whole punishment to one offence, if there be but one, or to each offence if there be more than one; and not part of the punishment to the offence contained in one count, and part to that contained in another. This

* 263 * must be the case in capital cases, where there can be but one sentence of death, though there be many counts; and also in cases where, in the terms of your Lordships' question, the punishment is fixed by law, and only one such punishment is mentioned in the judgment; and I see not why it may not be equally so where the punishment is discretionary.

If there be any question afterwards in a Court of Error as to the sufficiency of any count, surely that Court is bound to suppose that the Court below, not having given a separate judgment on each count, has given its whole judgment and passed its whole sentence in respect of each count; and then the judgment will rest and be supported on those counts which are properly constructed, and on which the defendant has been found guilty in due and proper form, notwithstanding there may be other counts which are bad: and that I understand to be the meaning of the words in the present judgment, "for his offences aforesaid;" that is, for those offences which are properly charged and properly found against him, the whole punishment being for each offence, and the maxim of "*utile per inutile non vitiatur*" will fully apply.

It is said that such a view of the case works hardship on the defendants, for they cannot tell on which counts they are really convicted, so as on any future occasion to be able to plead *autrefois convict*. Now such a plea, if controverted by the Crown, must in all cases be supported by proof of the identity of the offence; and if the supposed subsequent indictment should consist of the good counts of the former indictment only, it is conceded that the defendants will not be placed in any difficulty; but if of the bad counts of the former indictment, it is said that the defendants will be placed in difficulty, since their plea would be * answered * 264 by its being said, You were not convicted, because those counts were bad.

This appears to me to be a most palpable fallacy. In the first place, it cannot lie in the mouth of the prosecutor so to say; for the former conviction on the bad counts remaining unreversed, is a good conviction, be the counts never so bad. In the next place, the correspondence of the precise language of the first and second indictments is wholly immaterial to the plea, if the offence be shown by evidence to be the same.

Something was said as to the possibility of a pardon for one or more of the offences, and the defendants not being able to know how much of the judgment would thereby be remitted; but this argument goes too far; for it would, if valid, show that a general judgment was always bad, even where all the counts were good.

The case of *Young and Others v. Rex*, in error, (a) is an authority in favour of the doctrine that one good count in an indictment will sustain a judgment, notwithstanding other bad counts. But perhaps the nearest case to the present is that of *Rex v. Powell*, (b) which was also one arising upon a writ of error from the Court of Quarter Sessions to the King's Bench. There the indictment contained two counts, — one for an assault with intent to commit a rape, the other for a common assault. The entry of the verdict was, that the defendant was guilty of the "misdemeanour and offence afore-

(a) 3 T. R. 98.

(b) 2 B. & Ad. 75.

said," in the singular number, and the point discussed was whether those words were *nomina collectiva* or not ; if not, then it would be uncertain on which count the verdict proceeded, and if it proceeded on the second, the judgment would be bad, because the defendant was sentenced to * 265 be imprisoned with * hard labour during the whole time ; whereas for a common assault hard labour cannot be imposed. The Court held that the word misdemeanour was "*nomen collectivum*," and therefore the verdict applied to both counts. It never, however, occurred either to the Court or to the defendant's counsel to suggest that if the verdict did apply to both counts, the judgment, which was general, must also apply to both ; and as every part of the time of imprisonment was accompanied with hard labour, it would follow that some part of the judgment was erroneous ; viz., that part, whatever it might be, which applied to the second count ; and as the Judges in the Court of Error could not tell how much of the judgment was bad, they could not reverse it in part, but must reverse it in the whole. Yet if the doctrine now contended for by the defendants (namely, that every general judgment, where there are several counts, must be taken as the aggregate of several judgments, one on each count) be right, such ought to have been the result ; and though this case is no direct authority to show that that doctrine is not right, yet it is a strong presumptive argument the other way, and, at all events, shows, amongst the other books and authorities, what has hitherto been the received opinion and practice on the subject.

For these reasons I am of opinion that a judgment given under the circumstances stated in the question lastly proposed by your Lordships cannot be reversed on a writ of error, and that it makes no difference whether the punishment be discretionary or fixed ; and, as I have said already, I think that the same reasoning applies to the third question ; not only as to that part of it which relates to defects in the present indictment itself, but to that part which relates to defects in the findings of the jury. Assuming the * 266 * judgment to be bad as regards the first, second, third, sixth, and seventh counts of this indictment, by

reason of the defects of the findings on the first, second, and third counts, and by reason of the defects in the sixth and seventh counts themselves, still it remains an entire and good judgment on the other counts of the indictment, and cannot be reversed.

MR. JUSTICE MAULE. — As to the third and the eleventh questions, I agree in the conclusions at which my Lord Chief Justice and my brother PATTESON have arrived. When a person is convicted on a criminal charge, the Court, in order to determine what judgment to pronounce, must first look at the record to see of what he is convicted, and must then inquire what penalty the law imposes for such a conviction. If the penalty be fixed by law, as in case of judgment of death, and in some cases of transportation for life, no further inquiry is necessary. Nothing but the law and the record are to be looked to, and the judgment required by law is to be pronounced. But in those cases where the law fixes only the species or the limits of the judgment, leaving the amount of punishment to the discretion of the Court, there is a third inquiry to be made; namely, what amount of punishment of the legal description, and within the legal limits, is suitable to the particular case in which judgment is to be pronounced. The Court must look beyond the record to determine this last question of amount. If it could not do so there would be no reason for leaving any discretion to the Court, and the amount could be fixed by the law, and if it could, no doubt it ought to be and would be so fixed; and accordingly the universal practice is for the Court to look beyond the record in such cases, in order to

* determine from the circumstances of the case the * 267 amount of punishment. In cases of conviction on a verdict, the evidence given at the trial is usually the main source of information on this subject; but other modes of ascertaining what ought to be the amount of punishment under the circumstances are occasionally adopted; so that the record in such cases only points out the species of the punishment; as, for instance, fine and imprisonment. When that is once pointed out the record affords no further assist-

ance, and the amount is to be determined by the circumstances of the case, which do not appear on the record.

With respect to the questions, whether the record finds any offence, and what the species of punishment should be, as no more is necessary to determine this than a right construction of the record and a knowledge of the law, they are fit subjects for a writ of error, by which the record is brought before a superior Court of Law. But the question of the amount of punishment is not a subject for a Court of Error, which has not before it the evidence at the trial, or the other matters which determined the amount of punishment. It appears to me, therefore, that when the record states that the defendant has been convicted for an offence for which he is liable to be sentenced to pay a fine and to be imprisoned, and to find sureties, and he is sentenced to pay a fine, be imprisoned, and find sureties, it is no ground for reversing the judgment that there are other parts of the record on which, if they stood alone, no judgment could be passed. If it were otherwise, it might well be that a judgment would be reversed by a Court of Error, which, if it had been in the place of the Court below, would have sentenced the defendant

to the very same same species and amount of punishment. I think, therefore, * that neither in the record referred to in the third question, nor in that supposed in the eleventh, the judgments can be reversed on writ of error.

MR. JUSTICE COLTMAN. — The Lord Chief Justice of the Common Pleas having delivered the unanimous opinion and reasons of the Judges upon all your Lordships questions except the third and the eleventh, it is unnecessary for me further to advert to any other than those two.

And to the third question I answer, that in my humble opinion there is sufficient ground for reversing the judgment, by reason of the defects of the indictment, and by reason of the defects of the findings of the jury, and the judgment given thereupon; and I ground my opinion upon the reasons which will be given at length in the answer to the eleventh question; to which reasons I crave leave to refer, and

which appear to me to apply equally to all the defects to which the question refers.

To the eleventh question I answer, that in my humble opinion, where an indictment consists of three counts, A., B., and C., and the counts A. and B. are good and the count C. bad, and judgment is given that the defendant, for the offences aforesaid, be fined and imprisoned, such judgment being sufficient in point of law if confined expressly to the counts A. and B., such judgment ought to be reversed on error.

I am well aware that a contrary opinion has existed generally amongst the members of the legal profession; but there is no difficulty in seeing what has given rise to this general impression; and when we look for any legal authority to support it, there is little or none.

The authorities relied on arose on motions in arrest * of judgment, or the expressions used are with * 269 reference to the state of things before judgment is pronounced, and are quite true as applied to criminal proceedings in that stage; but the case may be different after judgment has been given.

The authorities relied on are, *The Queen v. Ingram and Wife*, (a) *Peake v. Oldham*, (b) *Grant v. Astle*, (c) *Rex v. Benfield*, (d) and are all subject to the observations above made, that they are true with reference to that stage of the cause with reference to which they were made, but not applicable to the question when it arises on error after a judgment recorded.

One case has been found, *The King against Young and Others*, (e) in which there were four counts, two good and two bad, and a general judgment was given of transportation for seven years; and this was held good in error, notwithstanding the badness of two of the counts. But the objection raised in this case was not noticed by the Court in the judgment of the Judges, nor does it appear to have been at all insisted on in argument. It is therefore to be considered not a decision, but a precedent only; and in a Court of

(a) 1 Salk. 384.

(c) 2 Doug. 730.

(e) 3 T. R. 98.

(b) Cowp. 285.

(d) 2 Burr. 980.

Error, where the question now arises for the first time, cannot be considered as a binding authority.

If we consider the question on principle, the argument in support of the sufficiency of the judgment seems to me to stand thus: where there is but a single count in an indictment, as was the case in old times, although it contains several superfluous and idle allegations, if yet it contains pertinent matter, properly alleged, and sufficient to sustain a criminal charge, the Court is warranted in passing
 * 270 the appropriate * judgment on the whole count, and may wholly pass by the superfluous and idle matter: and in like manner, now that it has become usual to insert many counts in an indictment, it may be argued, that if there be one good count, and others which are bad, the Court, on looking at the whole record, may treat the bad count as idle and superfluous matter, and passing it by without regard, give the appropriate judgment which is suited to the good count: and the practice at the assizes is in conformity with this view of the case, where it is not usually the custom to do more than give a general judgment on the indictment, without stopping to consider whether any of the counts are bad in point of law.

But to this view of the question I should answer, that I do not conceive the case of an indictment with a single count containing some idle and superfluous allegations can be considered as standing on the same ground with the case of an indictment containing several counts, some good and some bad; for in the former case the indictment professes to contain one criminal charge only, in the latter it professes to contain several distinct charges, and each count is in the nature of a separate indictment; and I conceive that the defendant is entitled to know on which of those charges he is sentenced, and which of them are passed by as insufficient in law. And the reason why I conceive he has that right is, that if he is convicted of an offence, though upon an insufficient indictment, and judgment is pronounced upon him, and he undergoes the punishment of the law, he may plead the conviction to any other indictment for the same charge. In the case supposed in your Lordships' question, if the defend-

ant were again indicted for the same offence as that which is insufficiently charged in count C!, and * were * 271 to plead the former conviction, how is the Court to deal with the case? how is it to know whether the party has suffered the sentence of the law or not?

It may be said that the Court has only to look to the original record; it will then see that the count is bad, and must infer that the Court which passed the sentence was aware of the defect in the count, and did not pass any portion of its sentence in respect of it. This reasoning would be quite just, if Courts of Law were infallible; but as all writs of error proceed on the ground of the recognized fallibility of human judgment, the presumption that the Court has not committed an error is not a safe one to act upon, and may be directly at variance with the fact. Surely there ought to be some more safe ground from which to judge what the Court has done. Every record ought to speak explicitly and distinctly. The Court ought in some intelligible way to show distinctly the grounds on which it has proceeded, in order that the party may not lose the benefit of the plea he is entitled to, and the Court of Error be enabled to see whether there has been an error committed, and to redress it if it exists.

Lord COKE says, (a) "In the case of acquittal the judgment is *quod eat sine die*, which may be given as well for the insufficiency of the indictment as for the party's innocence or not-guiltiness of the offence; and the Judges of the cause ought, before judgment, to look into the whole record, and upon due consideration thereof to cause it to be entered '*ideo consideratum est quod eat sine die.*'" And it is said by Lord HALE, (b) in speaking of an acquittal where the indictment is insufficient, "It is reason to have the *eat sine die* special in that case, '*eo quod indictamentum apparet * minus sufficiens, ideo consideratum est quod eat sine * 272 die;*' and then it (the acquittal) is applicable only to the insufficiency of the indictment."

The remarks of these two eminent Judges are here made

(a) 3 Inst. 214.

(b) Vol. 2, c. 55, p. 393.

with reference to the entry of a judgment upon an acquittal ; in fact, upon an insufficient indictment. But where the prisoner excepts to the insufficiency of the indictment, or the Court does it *ex officio*, Lord HALE, in the same chapter, (a) says, “ The judgment is special, ‘ quod indictamentum ob insufficientiam cassetur, et quod ’ the prisoner ‘ eat inde ad præsens sine die.’ ” And such an entry as to the insufficient count would, I conceive, have been a proper one in the case supposed in your Lordships’ question. The judgment might, perhaps, have been free from error if it had been expressly confined to the good counts, and no judgment at all given on the bad count ; but where the judgment is, as in the case supposed, general, it must be considered as having been given on all the counts, and here, indeed, is expressly said to be so. One of the counts being bad, the judgment seems to me erroneous.

It may be urged, that although, according to the modern practice of the Courts, various counts are inserted, yet there is usually but one *corpus delicti* really intended. That such is usually the case in felonies is true, and if it turns out to be otherwise, the Judge in his discretion may restrict the prosecutor to one charge ; but the practice is otherwise in misdemeanours like the present, and the point, therefore, cannot be considered as merely technical.

If we suppose a case, which must be allowed to be possible, that the Court below, mistaking the law, passes a judgment with reference to a count which * contains no legal charge, and the party sentenced undergoes his punishment, if he should be again indicted for the same offence it would be manifestly unjust that he should be liable to further punishment ; but if in such case he should plead the former conviction, the Court before whom the second indictment is pending, looking at the original indictment, will say, contrary to the fact, “ The Court by which the case was first tried must have seen that this count C. is bad ; the defendant could not have been sentenced on this count.” Or if the Judges of the Court before which the second indict-

(a) 2 Hale’s P. C., p. 395.

ment is pending should allow the plea on the ground that they cannot see but that the Court which passed judgment on the first indictment might have given judgment with reference to the bad count, there will then be introduced into practice an inconsistency of a very strange nature: the Court of Error, on looking at the record of the judgment, will hold that it must be presumed that the Court below passed no judgment with reference to the bad count; while the Court before which the second indictment is pending, on an inspection of the same record, will presume that a judgment was given with reference to that count. Such an inconsistency ought not to be admitted, if the law is to be considered as any thing in the nature of a science, or as any thing more than a rude collection of arbitrary rules.

It may be said that the rule against which I am arguing is convenient in practice. It may be so; and if established, it may save the practitioners and the Judges some expense of care and diligence, though I think not much. But such a rule seems to me neither consistent with the dignity of the law as a science, nor, what is more important, does it tend to promote the ends of substantial justice. If a judgment

* in such a case were reversed, it is to be remembered * 274 that the defendant would still remain liable to be prosecuted on an indictment properly framed.

In reply to the latter portion of the eleventh question, it seems to me, that if the punishment attached to counts A. and B. were certain, as, for instance, a year's imprisonment, and the judgment were that for his said offences he should be imprisoned for a year, the same reasoning would apply, though partially only; for although the probability in that case would be greater that the judgment was given in respect of the counts A. and B., and not in respect of the count C., yet I think it ought to appear distinctly on what count the judgment was given. The judgment, however, in such a case would be substantially just, though untechnical; which cannot, I think, be predicated of that in the former case.

MR. JUSTICE WILLIAMS. — The difference of opinion which to a certain extent exists amongst the Judges arises either

upon the third or upon the eleventh question proposed by your Lordships, or upon both. In my view of the subject, however, that difference will be found to arise upon the eleventh.

But before I proceed to notice the point or points upon which a difference of opinion exists, I think it not unfit to premise that, as to what may be deemed the merits, there is no such difference. There is no doubt, as your Lordships have already heard (so far as the opinion of the Judges is concerned), but that there are good counts in the indictment, with appropriate findings thereon, which would have sustained the judgment; no doubt but that the judgment, so far as the kind and quality of the sentence is concerned, is unobjectionable; none, but that the decision of the

Court below upon the matters contained in the plea * 275 * in abatement, and those assigned for error *coram nobis*, was correct in point of law; none, but that, if a motion had been made in arrest of judgment in the Court below, that motion, according to all usage and authority, ought to have been refused, because there are good counts; none, I believe, but that, if a *nolle prosequi* had been entered upon the objectionable counts and findings, no objection would have existed. The objection, therefore, is purely of a technical nature, and to be examined in the same spirit of minute and exact criticism in which it is conceived.

I have said, however, that the difference of opinion amongst the Judges does really arise upon your Lordships' last question; and for this reason: because, in my opinion, where the language of the judgment is (as here it is) that each defendant shall "for his offences aforesaid" suffer punishment, a good count or counts, with a bad finding thereon, does not differ from the case of a general finding which is unexceptionable, upon an indictment containing one or more bad, with some good counts in such indictment. Now the Lord Chief Justice has delivered our unanimous opinion that there are several counts, good in law, upon which the finding of the jury is so defective that no judgment can be sustained thereon; and they therefore must, in my opinion, be classed with those counts which the Judges are of opinion are insufficient in

point of law. There are other counts also which, according to the same opinion, are clearly good, and the finding of the jury thereon unexceptionable.

I come therefore to the eleventh, and (see *ante*, p. 232) the last but most important question, as I think it has been throughout, and in my opinion rightly, treated.

* In considering this question, it is to be observed, * 276 first, that so far from any instance having occurred in which this objection has prevailed, the constant opinion, founded upon corresponding usage, has been that a judgment under the circumstances supposed would be good and valid in law. I will not place this argument higher than it deserves; there may have been an ancient and long-continued error, though that ought to be shown, and not presumed; but it is good for something, and it is for your Lordships to judge how much. If, indeed, it be entitled to the weight which Lord Chief Justice WILMOT, in *Wilkes's Case*, (a) attributes to it, it goes very far indeed; "for a course of precedents and judicial proceedings," he observes, "makes the law."

Upon the same footing with the prevalence of opinion and usage, I am inclined to rank the *dicta* of Lord MANSFIELD, in the cases of *Peake v. Oldham* (b) and *Grant v. Astle*, (c) in both of which (in the latter more especially) he deprecates the rule which has prevailed in civil cases, "which," he says, "appears more absurd, because it does not hold in the case of criminal prosecutions; for where there is a general verdict of guilty on an indictment consisting of several counts, if any one of them is good, that is held to be sufficient." This surely must be entitled to some weight; the deliberate (because repeated) opinion of a Judge of much reputation; not, indeed, so much expressing that opinion, as vouching what had been done, — "held to be sufficient;" for that is the language.

In the case of *Rex v. Powell*, (d) the defendant was con-

(a) Opin. & Judgments, 330.

(c) Doug. 729.

(b) Cowp. 276.

(d) 2 B. & Ad. 75.

victed upon an indictment containing two counts;
 * 277 * one of these authorized the infliction of hard labour, and the other did not. Upon a general verdict of guilty upon the whole indictment, the defendant was sentenced to imprisonment with hard labour; and, upon a writ of error brought, the Court of Queen's Bench sustained the judgment of the Court below, although one count of the indictment (as has been already observed) was not sufficient for that purpose.

In the case of *Regina v. Rhodes and Colle*, (a) a point nearly resembling that which was pressed with the greatest earnestness at your Lordships' bar was brought under the notice of the Court, upon motion in arrest of judgment. That was an information for subornation of perjury, and the verdict guilty. The report goes on thus: "A motion was made in arrest of judgment, and the counsel excepted (first) to several of the assignments of perjury; and he compared the case" (as was done at the bar) "to that of general damages, where one count, being insufficient, will vitiate the whole. So here" (this is a continuation of the counsel's argument), "the defendant being to be fined upon the whole information, and that fine being entire" (as here also contended), "if any of the assignments of perjury are wrong, the Court will arrest the judgment. But HOLT and the whole Court were of the contrary opinion, and that, if all the assignments of perjury, but one, be wrong, that one would be sufficient for the judgment to be given upon by the Court."

I now come to a case which will not admit of that distinction, and will not admit of that answer, that it was not upon a writ of error, for it was. The case which I now beg
 * 278 leave to bring under your Lordships' * notice is that of *Rex v. Young and Others*, (b) which, if I am not wholly deceived, has a very strong, if not decisive bearing upon the present case. [His Lordship stated it.] This case also followed in point of time that of *Rex v. Mason*, which estab-

(a) 2 Ld. Raym. 886.

(b) 3 T. R. 98.

lished the law, that a count not setting forth the nature of the false pretences, was bad in law. The case of *Rex v. Mason* was cited, and brought distinctly under the notice of the Court, of which Lord KENYON and Mr. Justice BULLER were members. The badness of two counts in the indictment was placed beyond a doubt: and herein I must take leave, with great deference, not perfectly to agree with my brother COLTMAN; for I think, upon reference to the case, it will be found that the very point of there being two bad counts (and bad counts because *Rex v. Mason* had decided them to be so), was distinctly before them. The defendants were found guilty generally, and sentence passed upon the whole indictment; the sentence was discretionary, for the punishment might have been imprisonment, or (as it was) transportation; the bad counts might have contributed there to swell the punishment, and nobody could tell how much; a learned counsel of very considerable reputation was heard at length, and the Court (composed as I have mentioned), without hearing the other side, affirmed the judgment. Now if that be not a case in point, so far as the eleventh question is concerned, I am at a loss to comprehend what can be so considered.

And now, as to the principle; and upon this part of the case I beg leave to state, almost in the same terms which my brother MAULE used some time ago, that the question before a Court of Error, in my * opinion, is the legality * 279 of the proceedings of the Court below; not what the Judges ought to have done (speaking with reference to the infliction of punishment), but what they might do. If a sentence be of the kind which the law allows, the degree of it is not within the competence of a Court of Error. If a fine be an appropriate part of the sentence of a Court below, the excess of it is no ground of error. What possible line can be drawn between reasonableness and excess, so as to affect it with illegality? It is obvious that there can be none. The fine imposed may be of such extravagant amount, as justly to subject the Court which has imposed it to severe animadversion; it may be unconstitutional (if such a phrase is permitted to me), but it is not therefore, with reference to

interference by a Court of Error, illegal. If, in this case, the sentence had been transportation, the sentence would have been illegal: and why? Because it is not of the kind which is authorized by the law in such case. Why is a fine, apparently excessive and exorbitant (supposing such a case to exist), not illegal? Because it is the kind of punishment appropriate to the case. The result of my opinion therefore is, that the inquiry in a Court of Error must be, whether there be a count or counts, with proper findings thereon, which could justify the sort of punishment adjudged by the Court below; and that this is the only question, wholly unaffected by another and different one, which is, whether there are other counts in the indictment which would not justify the infliction of such punishment, or of any.

I further think that there is no difference whether the punishment be discretionary or fixed by law. If there be an indictment for an offence to which a punishment
 * 280 fixed by law is attached, that would sustain * a judgment upon such indictment, though there may have been in it one or more bad counts. Equally so, in my opinion, may a discretionary punishment be sustained, if it be otherwise conformable to law, though there should be, as just supposed, some good and some bad counts; and that the judgment should be referred to those counts which will sustain it, and not to those which will not. And, accordingly, the judgment upon each defendant is, that "for his offences aforesaid" he shall undergo a certain punishment. Now, what are "his offences aforesaid"? Surely not what is so imperfectly described as to amount to no offence at all, as is the case in the bad counts: surely not those findings of the jury, which are so independent of and extraneous to the counts to which they are intended to be applicable that no judgment can be pronounced thereon, any more than on those counts which are bad in law; but what is contained in those counts and findings (and there are many such) upon which the Court might legally pronounce their judgment.

And what, I may be permitted to ask, is there which gives your Lordships to understand and be informed that judgment may not have been — actually was not — given

exclusively upon those counts and the findings thereon, to which (according to the opinion of all the Judges at least) no possible objection applies? Why is it to be assumed that upon the erroneous parts of the record, or some of them, the judgment has proceeded, when (as has been too often already repeated) there are so many without objection?

It remains for me to make some remarks upon the supposed analogy between the present case proposed by your Lordships in this question, and a writ of error brought in a civil case, where there are one or more * bad counts in a * 281 declaration, and general damages given, — a point much urged and relied upon at the bar. It appears, however, to be clear that, upon examination, such supposed analogy will be found to fail. The reason why, in a civil case where general damages are given in the case just supposed, the judgment cannot be sustained in a Court of Error, is that the finding of the jury is the ground of error; not that there is any mistake in such finding, for the jury is not to examine the validity of the counts, but that it is impossible for the Court to know how much may have been given in respect of the good, and how much in respect of the bad, counts. Of this a Court of Error can have no knowledge, and has neither the means nor competence of deciding; nor the Court below either. But in a criminal case, with a finding of guilty, there is nothing which bears any resemblance to the damages found in a civil case. In a criminal case, the verdict being guilty, and a judgment accordingly, the question is, whether there is upon the record enough to sustain the judgment. No question is raised like that of damages, as to which, belonging as it does to another tribunal, the Court can form no opinion, and has no means of deciding; that is, how much is to be referred to the good counts in a declaration, and how much to the bad. In the criminal Court there is no foreign subject (if I may use the expression) into which the Court cannot inquire, but it may examine and decide whether, upon the face of the proceedings, there is enough to sustain the judgment. The Court below also has the power of assessing the amount of punishment, as well as of forming a judgment upon the validity of the indictment: not so in a

civil case, for there neither a Court of Error nor the
 * 282 Court below can rectify an error that has * arisen from
 the finding on one or more bad counts of the de-
 claration.

Independently, therefore, of the opinion of Lord MANS-
 FIELD already referred to, and passages of a similar import
 which are continually recurring, there are reasons why the
 distinction, which he twice over affirms to exist between
 criminal and civil cases, may be sustained upon sound prin-
 ciple.

My answer, therefore, to the third and eleventh questions
 proposed by your Lordships, is in the negative.

MR. BARON GURNEY. — My Lords, my Lord Chief Justice
 having delivered the unanimous opinion of the Judges, with
 their reasons, upon all the questions proposed by your Lord-
 ships, with the exception of the third and the eleventh, it
 remains for me to offer to your Lordships the opinion which
 I have formed upon the third and eleventh questions. As to
 the third, I think that there is not any ground for reversing
 the judgment, by reason of any defect in the indictment, or
 of the findings, or entering the findings, of the jury upon the
 indictment. With respect to the eleventh, I think that in
 the case put, the judgment cannot be reversed on a writ of
 error, and that it will not make any difference whether the
 punishment be discretionary or a punishment fixed by law.
 We are all of opinion that the fifth, eighth, ninth, tenth, and
 eleventh counts of the indictment are good counts. The
 judgment of the Court of Queen's Bench in Ireland may, I
 think, be well sustained upon those counts. The judgment
 of the Court upon each of the defendants is, "for his offences
 aforesaid." Now as to two of the counts, we are all of opin-
 ion that what is stated in each of them does not amount to an
 offence ; therefore I think that it is not to be presumed
 * 283 that the * Court of Queen's Bench has given judgment
 upon those counts ; on the contrary, it is to be pre-
 sumed that it has not done so.

It is unnecessary again to refer to the cases of *The King*
v. Powell, *The King v. Mason*, *The King v. Young*, which

have been cited and dwelt upon more particularly by my brother WILLIAMS. We are of opinion that the findings of the jury upon the first four counts, which are good, are defective findings; but I do not think it follows that that invalidates the judgment upon the five counts which are decided to be good. Upon those bad findings, I think that it is to be presumed no judgment has been pronounced. I cannot distinguish between a bad finding on a good count and a good finding on a bad count. They appear to me to amount to precisely the same thing; namely, that upon which no judgment can be pronounced. The judgment must be taken to have proceeded upon the concurrence of good counts and good findings, and upon nothing else. It has been contended at your Lordships' bar, that inasmuch as there are some counts which are bad, no judgment can be pronounced upon those which are good; and this has been argued on an analogy which has been supposed to exist between civil and criminal cases. The distinction between one and the other has been always recognized, and the only regret that has ever been expressed upon the subject has been that such a rule should have prevailed in civil cases, by which justice has been so frequently defeated; but in criminal cases it has always been decided that if there be one good count, the Court is warranted in pronouncing judgment; and no case has been cited, or I believe can be cited, in which any Judge has ever suggested that the rule would be different in a writ of error from *that which has prevailed on * 284 motions in arrest of judgment. I should think that it would be a very dangerous thing to unsettle that which has hitherto been considered established law; that in criminal cases a judgment is valid where there is a good count to warrant it. It has been contended that the judgment of the Court must be taken to have been made up and compounded of so much punishment on one count and so much on another, as if it were two months imprisonment on one and three on another, and so on; and that we ought to ascribe part of the punishment in this case to the bad counts or the bad findings. This certainly is not the mode by which any Court proceeds in fixing the punishment. The Court ascertains that there is

a good charge and a good finding to warrant the judgment, and then it takes into consideration all the circumstances of the case, — those of aggravation and those of mitigation ; and it apportions the punishment to each defendant according to his demerit ; and therefore it may well happen (as in the present case), that, according to the greater or less degree of aggravation, the punishment of persons convicted of the same offence will vary ; to some will be allotted more, to others less. But this is not a matter for the consideration of the Court of Error. A Court of Error has no means of judging whether the punishment awarded is a just punishment, or whether it is too severe or too mild. All that a Court of Error has to consider is, whether the punishment be that which the law authorizes for the crime of which the defendant has been convicted. In this case the punishment is appropriate. The offence is conspiracy ; the punishment is fine, imprisonment, and recognizance for good behaviour.

* 285 * MR. BARON ALDERSON. — My Lords, the third question which your Lordships have directed me to consider in common with my learned brethren consists of two propositions. The former of those propositions is repeated as a substantive question in the eleventh question ; and I shall therefore propose to consider these together, and then to advert to the second branch of the third question separately.

I own that I feel very strongly the paramount importance of that which I first mentioned, believing as I do that an opposite decision by your Lordships would be productive of great inconvenience and failure of justice in criminal cases for the future. It is therefore a great satisfaction to me to find that on this, which is a purely technical question, I agree with so large a majority of my learned brethren.

The universal belief of the profession, as long as I can remember any thing, has been in conformity to what is stated in *Peake v. Oldham*, *Grant v. Astle*, and *Rex v. Benfield*. The language of Lord MANSFIELD, in *Grant v. Astle*, expresses the universal belief and tradition of the profession ;

and the invariable answer given to an objection in arrest of judgment on such a ground, has, according to my recollection, always been that it is immaterial to enter into the discussion of the question, because there is a good count; "and the Court always" (as is said *arguendo*, and assented to by the Judges in *Rex v. Benfield*), "in indictments and informations, will give judgment on that part which is indictable." If we were to examine our records we should find, I doubt not, a cloud of cases in which a general judgment has been pronounced on an indictment with one or more defective counts; but it has not occurred that any such objection has * ever been made the ground of an argument * 286 in a Court of Error: nay more, cases of writs of error are not wanting in which this objection, though on the very surface, escaped the notice of the most acute counsel and the most astute Judges. It is certainly possible that all this may be so, and yet the objection may be good, and a valuable, as it is certainly (to me at least) a new discovery. But although this question has been most ably argued, indeed with that *nimia subtilitas* of which Lord COKE speaks, but not I think with much commendation, yet the argument has failed to convince me that all this course of precedent and tradition is erroneous.

It is not, indeed, contended that the Court below in such a case cannot pronounce a valid judgment; on the contrary, if it was not to pronounce a judgment against the defendant, that would be erroneous; but it will follow from the argument that the Courts are always bound to hear and to decide on the validity of each count, and that those Judges who have said and thought that it was immaterial so to do, have deceived themselves and the profession; for they contend that it is an objection valid in a Court of Error, although not ground for arresting the judgment. Now, a defendant in a case of misdemeanour may always go to a Court of Error for redress; and if he does so, it must appear, according to this argument, in express terms on the record, what the judgment of the Court below on the validity of each count has been. And a defendant, consequently, in all cases is to have this benefit given to him, that if there be any doubtful

count he may say nothing in the Court below, but leave the Court to give its judgment; and then, if, on suing out a writ of error, the Court of Error should think the count

* 287 bad, it must reverse the judgment of * the Court below, and let him go free altogether: and he is to have

this further advantage, if he argues the question, of taking the chance of total escape, by reason of a difference of opinion between the Court of Error and the Court below on some immaterial count, and even, perhaps, if the Court of Error should think a count good which the Court below has deemed bad; and though both agree that the defendant ought to be punished on the whole record, he is to escape altogether from that indictment: so that the Court will be obliged in all cases to examine and decide upon the record, in some cases even without the benefit of an argument, in order to avoid the risk of a reversal of its judgment; in cases, too, in which all would agree that the judgment as given ought not to be varied, even as to the amount of the punishment. For punishment differs from civil damages in this, that it is imposed in respect of all the facts, whether formally laid or not, and even upon all the surrounding circumstances, character, and conduct of the defendant.

Before I come to such a strange conclusion, I think I ought to examine carefully what the principles of law are, and what the authorities are by which it is to be supported. I believe no authority has been suggested; but the argument mainly turns, 1st, on certain inconveniences supposed to be likely to arise to defendants in certain imaginary cases, if what I consider as the old rule be retained; 2dly, on some supposed analogy between civil and criminal cases; and 3dly, on the true construction, as it is said, of the words of the judgment on the record. I will consider these very shortly, in their order.

I am not insensible that some of the difficulties stated are real; and if the rule of the criminal law applicable to such cases must of necessity be a perfect rule, admitting of

* 288 no anomalies, and in no supposable * case of inconveniences, the argument is well founded. Pardons on the verge of impossibility, pleas of *autrefois convict* in very com-

plicated and improbable circumstances, and the like, may easily be suggested by fertile minds, drawing upon an imagination at once of a poet and a pleader for their facts. I will not go through these at length; it has been done already by many of my learned brothers. My answer to them all is this: the law proposes not a perfect rule, but being human, and therefore imperfect, must choose between conflicting inconveniences; and I think, in the rule which it has adopted, it has chosen the least. Then, secondly, is there any analogy between civil and criminal cases? There is no doubt that in civil cases the law is, and we have seen that Lord MANSFIELD lamented that it was so, that where there is a defective count and general damages, no judgment can be given on such a verdict. It is the duty, in such cases, of the Court to award a *venire de novo*, that the mistake may be corrected. If it should not award a *venire de novo*, but give judgment for the damages, the Court of Error will reverse that judgment, and will award a *venire de novo*. This was done in *Angle v. Alexander*. (a) But this plainly depends upon this principle, — which I deem to be the true principle on which a Court of Error should always proceed, — that the Court of Error there clearly sees that the Court below has given a wrong judgment. The Court must know that upon such a record the damages were given upon the bad as well as on the good counts; for damages are found by the jurors who have no jurisdiction to consider the validity or invalidity of the counts, but must treat all as valid. Secondly, the Court of Error corrects the judgment * of the Court below, and * 289 gives the judgment which the Court below ought to have given. In criminal cases both these important circumstances are wholly different. There the Court which awards the punishment has jurisdiction to say whether the counts are valid; and the Court of Error does not perform the analogous act of sending back the case for a fresh and proper judgment by the Court below, but altogether reverses it, and discharges the prisoner from the pending indictment. There is no resemblance, therefore, between the two proceedings.

(a) 7 Bing. 119; 4 Moo. & P. 870.

The course in civil cases is reasonable and just, but if applied to criminal cases would be unjust and unreasonable.

I have said, that I think the true principle in all cases of error is, that the Court of Error shall clearly see that the judgment of the Court below is wrong, before it sets that judgment aside.

And this brings me to the third and the main point; which is, whether, on the true construction of the words of the record, that does clearly appear; if it does, it should be set aside. The material words of the judgment of the Court are, that the defendant, "for his offences aforesaid," do suffer such a punishment. Now what is the reasonable meaning of the words "for his offences aforesaid," in a criminal record? The course of the Court, as stated in *Rex v. Benfield*, is to give judgment on the part which is indictable. The *dicta* in those cases where the motion in arrest of judgment is made, go to this extent: that it is immaterial and unnecessary to decide whether the count objected to is good or bad, because the Court always gives judgment on the good counts. All these are sensible and consistent, if we construe the words "for

the offences aforesaid" as meaning "for those charges
 * 290 in the indictment which are offences;" but *are wholly insensible and wrong, if they mean "for all the charges, good or bad, in the indictment." I therefore construe these words according to those *dicta*, and according to the universal tradition of the profession as to criminal law: and this is according, also, to their natural meaning; for a count which is bad, is so because it charges no offence. If so construed, there is nothing in the record to show more than this: that the Court below has decided that some counts of the indictment do contain offences, and that for those offences it has inflicted the punishment. Then the Court of Error examines the record; and if it finds that there are such counts, and that there are proper findings of the jury applicable to them, it is impossible, as it seems to me, that it should clearly see, or indeed see at all, that the Court below has made any error. If so, must it not affirm the judgment?

But then it is said, this mode of statement, if thus construed, will be too general a statement of the judgment of

the Court below. The defendant cannot clearly see what he is punished for,—on which counts and the like. But this generality has been according to the course of the precedents in such cases, and it is reasonable to adopt it,—that such monstrous inconveniences may not arise, as that a defendant, properly punishable in the opinion of both Courts, should, by reason of a diversity of opinion as to a matter of formal statement, escape judgment on the pending indictment altogether. The precedents are so, the convenience is in accordance with them; why should we alter the practice? That the precedents are so, and that no one ever imagined such an objection was tenable, appears from the cases of *Rex v. Powell*, *Rex v. Mason*, and *Rex v. Young and Others*. In *Rex v. Powell* there * were two counts; one which would * 291 support the judgment, the other not; for the judgment was of a peculiar species of imprisonment, viz., imprisonment with hard labour; all the punishment consisted of that sort of imprisonment. Now, the count for the common assault would not justify any judgment for laborious imprisonment at all. Nothing, therefore, can support that judgment, except the general principle that the Court of Error will confine the statement on the record, if susceptible of it, to a construction which will support the judgment, and that where there are a count and a verdict thereon which will support the judgment, it is quite enough; and it is clear the Court must have construed the general words of the judgment in the way before suggested, in order to do so in that case. The case of *Rex v. Young and Others* (a) was a writ of error: there the indictment contained four counts; the two last were admitted to be bad on the authority of *Rex v. Mason*, which was cited, and was precisely in point; yet there the judgment, being in general terms, was held sufficient. *Mr. Fielding*, who argued it very elaborately, and the Court of King's Bench, including Lord KENYON and Mr. Justice BULLER, no inconsiderable names, never dreamt of this objection. The whole gist of the argument was to get rid of the two first counts, which were ultimately held to be good. This is

(a) 8 T. R. 98.

almost an express decision on the point. It is impossible to believe the objection, if valid, could have been overlooked. If Lord KENYON had there said, when the counsel cited *Rex v. Mason*, in order to show the two last counts to be bad, "That is quite true, those counts are bad; but you know the general words of the judgment apply to the good * 292 counts alone;" and then * had affirmed the judgment, it would have been an express decision in point. I think the silence of the Court and bar on the subject speaks even with a louder voice to the same effect. *The King v. Mason (a)* is to the same effect, though not so strong an authority. *Mr. Marryat*, no unacute or inconsiderable lawyer, begins his argument thus: he says, "The second count is clearly bad." But he does not rest there, as he might have done, but proceeds to demolish the remaining count, and upon that alone argues for the reversal of the judgment: that also was a case of error. In both these last cases the punishment was discretionary, either imprisonment for a limited term or transportation; and the remark is obvious, that the bad counts, if acted on, may have caused the Court below to fix upon transportation rather than imprisonment.

It seems to me, therefore, that these precedents, as well as the *dicta* before referred to, afford a clear and plain exposition of the general words of the judgment of the Court, "for his offences aforesaid," conformable to that before suggested by me to your Lordships; and further, that such general words so construed are quite sufficient in criminal cases to support the judgment of the Court below upon a writ of error.

I shall only detain your Lordships for a short period on the second branch of the third question; which, although of great importance in this case, is not of that general interest which the other is. It depends on the peculiar findings of the jury here; and probably such a question (as it has never, that I am aware of, occurred before) will never occur again. Nevertheless, I think it must be governed by the same principles

(a) 2 T. R. 581.

and must receive the same solution as the other
* branch of the question. It depends, as that did, on * 293
the reasonable construction of the words of the judgment, which are these: "That the defendant, for his offences aforesaid, be imprisoned," &c. If I am right in saying that, according to the true construction of the words, "the offences aforesaid," your Lordships must take them to mean "those charges in the indictment which are offences," then I think that the words "his offences aforesaid" (which are those of the record in his case) must mean "those charges in the indictment which are offences, and which are sufficiently found against him by the jury;" otherwise, though they may be "the offences aforesaid," the counts being good, yet they are not "offences aforesaid," not being so found by the jury as to warrant a judgment against him on the record. And I think the same reasonable construction ought in both cases to be put on the words of the record; for I see upon the whole no solid distinction between a charge properly found but informally stated, and a charge properly stated but informally found by the jury.

The principle, therefore, on which my opinion proceeds is shortly this: that a Court of Error cannot reverse a judgment upon a mere conjecture that it may be wrong, but must see clearly that the judgment below is erroneous; and I think on the reasonable construction of the words of this judgment, expounded by the *dicta* of the Judges and the continued practice of the Courts, it is impossible to see with any certainty any error in it. I think also that the generality in the words of the judgment has been advisedly and properly adopted, and is recognized by the Courts, in order to prevent what otherwise would happen, and which is an opprobrium to the administration of justice, — continual failures on points of mere form.

* I may add, that I think the punishment, whether * 294
it be discretionary or fixed by law, makes no solid distinction; but it is obvious that in the case of a fixed punishment, it would be more palpably inconvenient and strange to reverse it for such reasons as are now suggested, on a writ of

error. My answer, therefore, both to the third and the eleventh questions, is in the negative.

MR. BARON PARKE. — Upon the third question proposed by your Lordships, and also the eleventh, which may be properly considered at the same time, I regret to find that after a most anxious consideration of this subject, I cannot bring my mind to concur with the great majority of my learned brethren; entirely agreeing with all of them upon the other questions which your Lordships have been pleased to submit to her Majesty's Judges.

In order to decide this question, we must assume that two of the counts of the indictment are bad, and charge no legal offence; that on three which are good there is an improper verdict of the jury, who have found parties guilty of more than one offence on counts charging one only; and that the remainder of the counts, and the findings on them respectively, are good. On one count, the fourth, there is the same defect, but it is cured by a *nolle prosequi*, and therefore it becomes unnecessary to consider it.

In this state of the record each defendant is, in the language of the judgment, "for his offences aforesaid, fined, imprisoned, or sentenced to find sureties of the peace," for a certain time. The third question is, whether a judgment in this form ought to be reversed.

I had certainly considered it to be a settled rule and well established, ever since I was in the profession,
 * 295 * that there was a distinction between judgments in civil and criminal cases, where there were more counts than one, and one count was bad, and a general finding by the jury; that rule being, that in civil cases the judgment for the damages found would be erroneous; in criminal cases a judgment warranted by any one good count would be good: my impression being, that as the reason of the rule in civil cases was, that the jury, not being presumed to know the law, were to be supposed to have given some damages on the bad count, which the Court had no means of apportioning; so in criminal cases the reason was, that the Court, being pre-

sumed to know the law, was to be supposed to have given its judgment on the good count only. I may say that it certainly was with some surprise that I heard that proposition disputed at your Lordship's bar. The full consideration of the able arguments I have heard on that subject has induced me to doubt extremely whether the rule is correct to the extent I have stated it, and whether it has not been carried too far by a misunderstanding of the *dicta* of Judges on applications in arrest of judgment.

If this point were to be considered independently of the understood rule upon this subject, and supposing that no such rule existed, I should say, that where an indictment contains several counts, each ought to be brought to its proper legal termination by a proper judgment. The practice has grown up, and much increased in modern times, of introducing many counts into one indictment; and though we know practically that these are most frequently descriptions, only in different words, of the same offence, they are allowable only on the presumption that they are different offences, and every count so imports on the face of the record, as Mr. Justice BULLER states in *Rex v. *Young*; (a) though the late Mr. Justice TAUNTON * 296 intimated a different opinion, I think without sufficient ground, in *Rex v. Powell*. (b) The question then being how these counts are to be dealt with on the face of the record, I should have said, *à priori*, that it was the duty of the Court acting between the Crown and the accused, and the right of the accused, to have the charge of each offence (for as such I must treat it) properly and finally disposed of on the record, so that the accused as well as the Crown might know for what offence the punishment was inflicted, and for what not; and so that the accused might plead his conviction in bar of another indictment for the offence for which he was punished, and that the Crown might also know that it might again prosecute for that offence for which he was not. Therefore, in this case, where some counts are bad, the Court, I should have supposed, ought *ex officio* to

(a) 3 T. R. 106.

(b) 2 B. & Ad. 78.

have given judgment that they were so, and quashed them; HALE; (a) by which the Crown would have been enabled to prosecute again for those offences, and the defendant would know that he could not plead his conviction of them. So in respect to those counts on which the jury have acted incorrectly, by finding persons guilty of two offences (on a count charging only one), if the Crown did not obviate the objection, by entering a *nolle prosequi* as to one of the offences, *Rex v. Hempstead*, (b) and so in effect removing that from the indictment, the Court ought to have granted a *venire de novo* on those counts, in order to have a proper finding; and then upon the good counts it should have proceeded to pronounce the proper judgment. In short, I should have

* 297 said that the defendant should on the *face of the record be put precisely in the same condition as if the several counts had formed the subject of several indictments.

But in the case of a certain description of punishments, which from their very nature can only be once inflicted, that of death and transportation for life, for instance, the record might be formal and sufficient without a judgment expressly given on each count, if for all the offences, in different counts, one judgment was given; because to put on the record a judgment that a person should be hanged or transported for life more than once would seem to be superfluous, and to savour of absurdity, and therefore in such a case the judgment might be good; it would be considered as given, from the very nature of the punishment, for each and every offence; and the insufficiency of one count, or the improper finding upon it, would in no way affect the judgment. Each offence would on the face of the indictment be finally disposed of; and though on the bad counts it would be the more correct course to give judgment that they should be quashed for insufficiency, the want of that would not vitiate the record; the accused would have been convicted, and received judgment on all; and if for any one offence contained in a count which is insufficient in point of law he had received a judgment, it would have been no hardship, as precisely the same

(a) 2 Hale, P. C. 396.

(b) R. & Ryan, C. C. 344.

judgment, and exactly to the same extent, would be justified by another good count. And so, where the punishment was discretionary, and the form and language of the record admitted of a construction by which the judgment might be applied to each and every offence ; for instance, suppose for each of three offences the judgment was that the defendant should be imprisoned one year, beginning and ending at the * same time, such a judgment would not be * 298 defective ; each offence would be disposed of by the judgment, and the defendant might plead *autrefois convict* to any subsequent indictment for any one of the offences, and there would be no absurdity in one and the same imprisonment being a punishment for different offences ; and the effect would be in such a case, that the pardon of the Crown for one offence would not operate as a discharge of the imprisonment ; the defendant would still remain imprisoned on the others ; and the same observation would apply to the cases of fixed statutory punishments by imprisonment or transportation, for instance, for a limited period, where the statute did not make it obligatory to inflict such separate fixed punishment for each separate offence.

Such, my Lords, is the course which would have appeared to me to be just and reasonable, and to be required by law, if there had been no authority on this subject ; and applying these principles to the present case, I should have thought the judgment, in the form in which it is entered on the record, erroneous ; because that judgment imports that it was given for all the offences charged against each prisoner, that is, upon all the counts ; some part of the punishment would be awarded to each, and two of the counts are bad, and three have had no finding of the jury upon them, which would, in the present state of the record (no *nolle prosequi* being entered as to part found on them), warrant any judgment upon those counts ; so that, according to the language of the record, the defendants have received sentence for five different offences (for so they must be assumed to be) for which they are respectively not liable to receive judgment at all ; and a Court of Error cannot say how much of the fine and how much of the imprisonment * belongs to each of- * 299

fence, and, the punishment being discretionary, clearly cannot itself pronounce any judgment.

Two modes suggested themselves to me, by which this apparent error could be rectified. The first is, that the Court of Error is to presume that the Court below has given judgment on those counts of the indictment only on which it was warranted to give judgment; viz., on the good counts, with sufficient findings thereon. The second, that the judgment may be read as one of the same imprisonment and the same fine, for each offence. To the first of these modes of supporting the judgment, there are two objections, — one, that the supposition does not accord with the terms of the judgment. If the judgment had been general, “therefore, it is considered that the defendant be imprisoned,” this objection would not have been of weight; but it is, “that he be imprisoned for his offences aforesaid;” that is, all the offences. It may then be said, that it is to be intended that the Court took into consideration only what were legally offences; that is, the good counts. But then it has also given judgment upon the good counts on which there has been no proper finding, and judgment for the offences found by the jury, not included in the counts at all. The answer offered to this objection is, that it is to be presumed that it has given judgment for those “offences” only which are such by law, are contained in the indictment, are legally described in it, and sufficiently found by a jury to warrant the judgment. I cannot help doubting, to say the least, whether such a qualification, or rather addition, to the language of the record could be permitted.

But, secondly, the other objection is, supposing the
 * 300 terms of the judgment general, without the words “for his offences aforesaid,” so that no violence would be done to the language of the record, by adopting the presumption that the Court acted on the good counts properly found only; the defendant would still be without the benefit, to which I have supposed that he was entitled, of knowing, on the face of the record, for which of the charges therein he was punished, so that he might plead *autrefois convict*. As to the ingenious argument of *Mr. Peacock* at your Lordships’ bar, that if pardoned for one offence, he could not tell how

much punishment should be remitted, I think the answer is, that it would prove too much, for it would equally apply to an indictment with all the counts and findings good, and one sentence of fine or imprisonment for all, — an objection wholly untenable. But with reference to the other argument, the defendant's condition as to future prosecutions (always bearing in mind that the offences are assumed to be different), if this presumption of supporting the judgment is to be adopted, the defendant must ascertain which count is probably bad and which good before he pleads such a plea; and he must then refer to the Court before which he pleads it, whether that count was bad or good, — a point which the first Court, I think, ought itself to have decided; for the plea of *autrefois convict* would on this presumption be bad or good, accordingly as the second Court decided the count to be bad or good, the first having given no decision upon it. It appears, therefore, to me, that there are very weighty objections to the adoption of the principle that the Court is to be taken to have given judgment on the good and well-proved counts only.

The second mode of supporting the judgment is by reading it as if it had been a judgment of the same imprisonment for a year, and the same fine for * each and every * 301 offence. If this could be done, each and every count would have been brought to its termination by a judgment thereon; and though the judgment on the bad counts and those insufficiently found would be erroneous, the judgment therefore could not be reversed. The good counts would equally support the judgment given to its full extent. The objection to this mode is, that it alters the language of the record, by making the imprisonment and fine a punishment for each offence instead of both, and that it cannot be supposed, without express words (whatever may be said about the sentence of imprisonment), that the Court intended precisely the same sum to be a fine or satisfaction to the Crown for each and every offence. *Prima facie*, at least a part must be for one offence, and a part for another; and the Court of Error cannot apportion it, for it does not know the facts in respect of which it is imposed. Independently of authority, therefore, I should upon principle, and for the reasons I have

mentioned, not have been satisfied as to the validity of the judgment in point of form.

It remains to consider what the authorities are. There is no decision on the subject; if there had been, it would probably have disposed of the question at once. But, undoubtedly, there is a prevailing opinion that any one good count well found will support a judgment warranted by it, whatever bad counts there may be, — the value of which opinion depends greatly upon the frequency of its being practically called into operation. This opinion, no doubt, is acted upon in practice to this extent, that judgment is continually passed upon a record containing many counts, without adverting to

any count in particular, upon the supposition that any
* 302 one count will support the verdict; * but such judgment is never entered formally on the record, unless the record is wanted for a special plea of a former conviction (a rare occurrence), or for a writ of error, which is not frequent, and the question relates to the form of the record. There are also some precedents which afford evidence of the practical operation of this opinion; for in those it may be reasonably supposed that the objection would have been taken, if such opinion was not fully established. And this consideration induces me to pause, and to doubt whether I ought to answer your Lordships' question in the affirmative. I cannot help thinking, however, that the opinion has grown up, without adequate grounds for it, from the application of the acknowledged difference between criminal and civil cases on a motion in arrest of judgment, in which the doctrine is clear to cases of error; and the latter being comparatively rare in criminal cases, the profession has not been sufficiently called upon practically to consider the difference. Add to this, in all capital cases, and in all in which the punishment could only once be inflicted, as transportation for life (if I am right in the view I have taken), the sentence would, from its very nature, be ascribed to each and every count, and therefore the objection that one was defective could not prevail; and by consequence the number of cases in which the doctrine would have to come under practical consideration would be much limited.

The *dicta* of Judges on this subject, on which reliance is placed, are principally those of Lord MANSFIELD and Lord Chief Justice EYRE. In *Grant v. Astle*, (a) on a writ of error, Lord MANSFIELD, speaking of the effect of a general verdict in civil cases, in * which, where one * 303 count is bad, and the assessment of damages is general, the objection is fatal, says, "it does not hold in the case of criminal prosecutions; for when there is a general verdict of guilty on an indictment consisting of several counts, if any one of them is good, that is held to be sufficient." This *dictum* does not necessarily mean more than that the verdict is sufficient to enable the Court to pass judgment. The same observation precisely applies to the *dictum* of that eminent Judge in *Peake v. Oldham*; (b) and that of Lord Chief Justice EYRE, in *Rex v. Fuller*, (c) was on a motion in arrest of judgment in a capital case, and all he says is, that it was unnecessary to consider the second count; and if I am right in the view I have taken, it certainly was, as the capital sentence could only once be imposed. In *Regina v. Ingram*, (d) Lord Chancellor PARKER, on a motion in arrest of judgment, makes a declaration of his opinion which cannot be understood to mean more than that the Court will pass the proper judgment, or that (in that case there being only one count laying a complete offence) the Court would reject the surplusage. Again, in *Rex v. Benfield*, (e) it was said (on a motion in arrest of judgment) that the Court will give judgment on the part indictable; and that it was not like the case of an action with general damages, for there the plaintiff can have no judgment. This declaration by no means goes the length of supporting a general judgment on several counts, where one is bad. The same observation may be made upon *The King v. Rhodes*. (g)

There are, however, some cases in which the objection * might have been taken, if it had been thought * 304 tenable. That cited in argument, *Rex v. Powell*, (h)

(a) Doug. 730.

(c) 1 Bos. & Pull. 180.

(e) 5 Burr. 981.

(h) 2 B. & Ad. 75.

(b) Cowp. 275.

(d) 1 Salk. 384.

(g) 2 Ld. Raym. 886.

where on an indictment for an assault with intent to ravish, and a common assault, the judgment of imprisonment for two years, and hard labour apparently for the whole time, is one ; and the sentence, if any part of the hard labour was to be ascribed to the common assault, was wrong. That point was not argued, and therefore the case is some authority as to the practical operation of the opinion to which I have referred. *The King v. Mason* (a) and *The King v. Young* (b) are two other of the reported cases in which, on a writ of error, the judgment was affirmed, where there were several counts on a misdemeanour, two clearly bad ; and a general judgment, “ for the offences aforesaid ” (for the record has been searched), of transportation for seven years. In the case of *The King v. Young* other points were argued, and this was not ; and it may be said, that if the counsel had not been satisfied that one good count would support the judgment, it would have been argued ; and these cases also are some authority as to the existence of the opinion, for its existence would account for no objection being taken. But it may be observed, that the objection taken in the present case was not available in that. The Statute 30 Geo. 2, c. 24, § 1, on which the indictment in both cases, *The King v. Mason* and *The King v. Young*, was framed, gives a discretionary power to fine, imprison, whip, put in the pillory, or transport ; but if the Court choose to transport, the period is fixed. Here the objection is, that

the defendant has been sentenced to some portion of
 * 305 his imprisonment, or at least fine, for * crimes of which he has not been legally convicted. No such objection would have been available there, as the defendant was sentenced to a punishment no part of which could be ascribed to the bad counts, seeing that neither more nor less of that species of punishment could be given upon any good count. The objection would have assumed a different shape, and would have been less striking.

The last case mentioned is a decision of the Judges in a Crown case reserved after sentence, *Rex v. Hill*, (c) in which

(a) 2 T. R. 581.

(b) 3 T. R. 100.

(c) Rus. & Ry. 190.

the Court held all the counts to be good but one. What the sentence was does not appear, nor how the judgment was entered up, if it was entered. The objection was not taken, and the reservation for the opinion of the Judges was expressly confined to this, whether all the counts were bad; for if they should be of opinion that all were bad, the defendant was to be entitled to a pardon.

That the Judges did not take the objection that the judgment was bad in such a case is not, I consider, of the least weight.

The result of this examination is, that I doubt whether the received opinion that, if any one count in an indictment is good and warrants the judgment, the judgment will in all cases be good on a writ of error, is so sufficiently established by a course of usage and practical recognition, though generally entertained, as to compel its adoption in the present case. I am fully sensible of the great importance of adhering to an established rule. If I had thought it fully established, I should certainly have abided by it, notwithstanding the serious objections which I have described; which are all, however, of a technical * nature, and the rule * 306 is practically productive of no real mischief to the prisoner, as in truth there is very rarely a charge in an indictment of more than one offence.

The doubt which I have had and continue to have on this part of the case is, whether that rule is so established as to prevent me considering its propriety. After much anxious consideration, and weighing the difficulties of reconciling such a doctrine with principle, I feel so much doubt that I cannot bring myself to concur with the majority of the Judges upon this question.

The consequences of holding that one good count will not in all cases support a judgment may be said to be, that a different and very inconvenient course will become necessary on criminal trials. I rather think that no great practical inconvenience will be found to result. In most cases of indictments with many counts, the defendant will be entitled, if the matter is attended to on the trial, to an acquittal on all but one; and where the verdict is on more, it will be neces-

sary for the counsel for the prosecutor to examine the record, and take care that the judgment is not entered on a bad count, or ask a nominal punishment upon a count which is doubtful. The cases in which such a course will be necessary will be rare.

I have now considered, I fear at too much length, both the third and (incidentally) the eleventh question proposed by your Lordships; and though I can by no means say that I am free from doubt, by reason of the prevailing opinion and the high respect I entertain for the opinion expressed by my brethren, I answer the third and eleventh questions in the affirmative.

* 307 * LORD CHIEF JUSTICE TINDAL. — My Lords, I am desired by my brother COLERIDGE to express his very great regret that he is prevented from attending your Lordships to-day, by very severe illness; and he has begged me to say, that after hearing the arguments at your Lordships' bar, and considering the questions, he concurs with the majority of the Judges in the opinion delivered by them upon the third and eleventh questions.

The Lord Chancellor, on the part of their Lordships, returned thanks to the Judges for the great care and attention which they had bestowed upon this important case; and proposed that the further consideration of it should be adjourned to Wednesday, and that the opinions be printed. Agreed to.

September 4.

THE LORD CHANCELLOR. — My Lords, after a careful attention to this case, I consider it to be my duty to move that the judgment of the Court below be affirmed. When the record was first presented at your Lordships' bar it occurred to me, as I believe it did to every other noble Lord who had attended to these proceedings, that it was proper, from the nature of the questions and the other circumstances connected with the case, and in order to avoid all possible suspicion of political influence or bias in the decision of your Lordships' House, that the assistance of her Majesty's Judges

should be required. Those learned persons were accordingly assembled by your Lordships' order. They attended with their accustomed patience to the long, elaborate, and able arguments urged at your Lordships' bar. As soon as it was possible, consistently with their other duties, they met to * consult upon the matters addressed to their * 308 consideration; and after taking the time necessary to form a correct judgment upon the subject, they again attended your Lordships, and communicated, in the learned opinions which you have heard, the result of their deliberations.

Upon all the points submitted to their consideration, with the exception of one question, or that which may be considered in substance as one question, their opinion has been unanimous. With respect to that one question, seven of the learned Judges, including the Chief Justice of the Common Pleas, have expressed a clear and distinct opinion against the objections that have been raised. The two remaining Judges, for whose learning and attainments I entertain the highest respect, have given a contrary opinion, but an opinion, I may be permitted to say, accompanied with no inconsiderable degree of doubt and hesitation. I think, under these circumstances, unless your Lordships are thoroughly satisfied that the opinion of the great majority of the Judges is founded in palpable error, you will feel yourselves, in a case of this kind, bound to adhere to their judgment, and to act in conformity with it.

I shall begin by stating to your Lordships the nature of this question; and after the full discussion which it has already undergone, I shall suggest to your Lordships, as briefly as the subject will permit, such arguments as occur to me in support of the opinion which I have formed.

My Lords, the indictment in this case consists of eleven counts. A general judgment has been entered. Some of these counts are stated, by the unanimous opinion of the Judges, to be defective, inasmuch as they contain no charge of any indictable offence. With respect to other counts, there is, according to * their opinion, a de- * 309 fect in another respect, not from any insufficiency in

the counts themselves, but on account of the findings of the jury, and the entering of such findings upon them. The question is, whether, under these circumstances, — there being some defective counts in the indictment, and with respect to other counts, defects in the findings of the jury, or the entry of such findings, — a general judgment can be sustained.

Your Lordships will observe that this is a purely technical question, — a question, I admit, of importance, and which arises out of the manner in which the judgment has been entered on this record. In what I have to submit to your Lordships respecting it, I am afraid I can do little more, after the frequent discussions which the subject has undergone, than repeat the reasoning which has been already addressed to your Lordships, and which is so forcibly stated in the opinions on your Lordships' table. It is not disputed that hitherto it has always been considered as an undoubted principle of the criminal law of England, that in a case of this nature a general judgment is sufficient. Lord MANSFIELD lays this down in the most distinct and unequivocal terms. (a) He draws a distinction between civil and criminal cases. In civil cases, he says, where a general verdict for damages has been found upon a declaration consisting of several counts, if one of those counts is bad, this is fatal. But with reference to the same point, namely, as to the effect of one bad count in criminal cases where there is a general verdict of guilty, he says, if any one of the several counts is good, this is held to be sufficient. In stating this rule, he at the same time expresses his regret that it should have been laid down

* 310 * differently in civil cases. It is said that to this rule there is an exception, to which I shall presently advert; but no such exception is stated or hinted at by that eminent Judge. He states the rule in the most broad and general terms. This is not to be considered as the opinion of that learned Judge alone. He sat upon the bench with some of the most able Judges that ever adorned the tribunals of this country. It was an opinion expressed in their pres-

(a) *Grant v. Astle*, Doug. 730.

ence, and must be assumed therefore to have been with their concurrence. That it was not an opinion hastily formed is obvious from this circumstance, that upon a subsequent occasion, in another case, (a) he again stated the same doctrine in the same comprehensive terms, and without any exception or qualification whatever.

I consider this, therefore, to be a general and settled rule; and from the first moment of my entering the profession, down to the time when I heard the point debated at your Lordships' bar, I never knew it called in question. I have found it constantly acted upon without doubt or hesitation. I find it so stated in every treatise on the criminal law; not limited in the manner my noble and learned friend I see would suggest, but stated as a general and settled rule. Now for the first time it has been contended (and I have the authority even of those who dissent from the opinion of the majority of the learned Judges for this statement) — for the first time it has been maintained at your Lordships' bar, that the rule does not apply to writs of error, but is confined to motions in arrest of judgment. I never before, in the course of a pretty long professional life, heard of such a distinction. I am sure there is no decision to warrant it; no authority that can be cited in support of it. The learned *Baron of * 311 the Exchequer, whose opinion is at variance with that of the majority of his brethren, said he was surprised to find it called in question. I confess I shared in that surprise; and I am satisfied, after all that I have heard, that there is no ground for the doubt that has been suggested, or for the distinction which has now, for the first time, been attempted to be established.

It is not immaterial to advert to the practice of the bar in cases of this nature, because it affords the strongest evidence of what is the general understanding of the profession upon this subject. In a civil case, the counsel for the plaintiff, when the jury have delivered their verdict, are cautious in entering the verdict, taking care that it is not entered upon a bad or doubtful count. No such caution is exhibited in a

(a) *Peake v. Oldham*, Cowp. 275.

criminal case. How is this to be explained? Are the parties less interested? Are the counsel less anxious in a criminal than in a civil proceeding? Far from paying any attention to the mode of entering the verdict, it is entered as a matter of course, without any regard to the sufficiency or insufficiency of the counts; and for what reason? Evidently because it has always been considered in the profession that any number of defective counts in the indictment cannot affect the judgment, provided there be one good count in the record to sustain it.

Now, my Lords, what is stated as the ground for the exception? It is said, How can you be certain that a part of the punishment has not been awarded in respect of the defective count? and the case is likened to that of a civil action where general damages are awarded. The distinction is this: in a civil action, where general damages are awarded, some portion

must be assigned to each count; and as the damages
* 312 * are awarded in an aggregate sum, the Court, when there is a defective count, cannot tell what portion was allotted in respect of such count; it has no means of apportioning them to the particular counts, and therefore, of necessity, the judgment must be arrested; or, if it has been entered up, the judgment must be reversed.

But this principle does not apply to criminal cases. It is not necessary that the punishment, or any part of it, should be assigned to every particular count. It constantly happens that the same substantive charge, with some slight variation in form, is repeated in two or more successive counts. There is therefore no such rule, nor can any person who is not in the confidence of the Judge be certain, where the punishment is discretionary, by what the extent of the sentence was regulated. The only thing necessary is, that it must be warranted by the record. There must be a sufficient charge, and a sufficient finding on such charge, to sustain it; and as on a writ of error you cannot go out of the record, or call in aid any fact which does not appear on the record itself, you have, in the case of a defective count, no means of knowing from the record that any part of the punishment was awarded in respect of the charge contained in such count. This,

therefore, bears no resemblance to a verdict for general damages in a civil action, where some portion of the damages must be assigned to each count, which the Court has no means of apportioning; and where, therefore, if one count be bad, the judgment must, of necessity, be erroneous. It was observed by one of the learned Judges, and justly, that if you reverse a judgment because you assume that the punishment, or a part of it, was founded upon a count which is defective, you may, after you have so done, find that the Judge had taken into his consideration, * among * 313 other circumstances, that very defect, in making up his mind as to the extent of the punishment which he felt it his duty to inflict. In a writ of error, the judgment can be reversed in those cases only where the error committed is clear and manifest; you cannot proceed upon conjecture.

But, independently of these considerations, let me call your Lordships' attention to the effect of the record in this case; which will, I think, satisfy you that there is no ground for this objection. It is a rule that upon a writ of error the Court can look only to the record, which must be construed according to its legal effect. Nothing can be taken notice of that does not appear or is not deducible from the record itself. The whole subject is technical, and must be technically treated. Now the judgment is, that the party, "for his offences aforesaid," shall be fined and imprisoned. What, then, are "the offences aforesaid"? They are the offences properly charged and properly found in this record. Two of the counts are defective. They are defective because, in the opinion of the learned Judges, they contain no charge of any offence. There are various allegations in those counts, but they do not constitute any offence known to the law. When the judgment, therefore, refers to the "offences aforesaid," it must, according to every rule of legal interpretation, relate only to those counts in which some legal offence is stated, and cannot be considered to include those which contain no such charge. It would be a manifest inconsistency to construe the record otherwise.

This view of the case appears to have made a considerable

impression upon the learned Baron to whom I before referred. He did not, however, attempt any answer to * 314 the objection, but contented himself with * passing to the other counts upon which the findings of the jury were defective; evidently considering that those counts would be sufficient to support a judgment of reversal. But I apprehend the same result will follow from these defective findings as from the defective counts. It was stated as the unanimous opinion of the Judges, and I entirely concur in that opinion, that the erroneous findings of the jury, and the erroneous entry of such findings, are altogether void; that they are to be considered as no findings, and that a good count upon which there is no finding, is in its effect the same as a bad count upon which there is a good finding; it is a mere nullity; that when judgment is given against a party for his said offence, it is given for an offence of which he has been found guilty, and that he has not been found guilty upon those counts upon which the entry of the findings is erroneous. The argument, therefore, that applies to the defective counts, applies equally to these counts; and when the judgment is awarded for "his offences aforesaid," it must be confined to those counts in which offences are charged, — offences in the view of the law, and to those counts in which the party has been found guilty of the offences charged against him; namely, those counts upon which the findings have been properly entered.

This, my Lords, is the only conclusion that can be deduced from this record. If the record is to be construed according to its legal effect (and this is the only way in which it can be properly construed), it must be considered as containing an award of judgment only for those offences which are properly laid, and those offences of which the party has been found guilty by a jury. The result, therefore, is, that the judgment is, in these respects, consistent and correct.

* 315 * But, independently of these considerations, what are the authorities upon this subject? When your Lordships come to consider them, you will, I think, be of opinion that they are conclusive. The first to which I shall

refer is of modern date, and I shall shortly call your attention to it. It is the case of *The King v. Powell*. (a) In order to show the application of that decision to the present case, I must state the substance of the record. The party was indicted for an assault, — this formed one of the counts in the indictment; there was a second count, in which he was charged with an assault accompanied with aggravated circumstances, — this constituted the whole of the record. When the judgment was entered up, it was entered in this form: “Guilty of the misdemeanour and offence aforesaid.” The judgment corresponded with the verdict, awarding two years’ imprisonment and hard labour, for the misdemeanour and offence aforesaid. A writ of error was brought, and this objection was raised: it was said that it appeared upon the record that the party had been found guilty merely of the misdemeanour and offence aforesaid; which imported only one offence, whereas there were two offences charged in the indictment, and it was therefore uncertain to which the verdict applied; and as the punishment justified by one count would not be justified by the other, this was stated as a ground of error.

Now, what was the answer given to this objection? The answer was, that the word “misdemeanour was *nomen collectivum*, and therefore the jury had found the party guilty of the whole of the offences stated on the record, — the offence stated in each of the counts.” The judgment also was in the same form, and the * Court was of opinion that * 316 the finding and judgment were correct. What, then, was the result of this decision? There was, in effect, a general finding that the defendant was guilty of the offences stated upon the record. One offence would warrant the judgment that was pronounced; the other would not, because it was a judgment of hard labour, and a judgment of hard labour could not be given for a common assault. The very question that we are now considering was thus raised. The very objection that is now made might have been taken upon that occasion; namely, that here was a general judgment,

(a) 2 B. & Ad. 75.

and that general judgment was only warranted by a part of the record ; and that the rest of the record, the finding being general, would not warrant or support it. It is said the objection was not taken ; which was the answer given, I think, by the learned Baron. But, my Lords, the objection was upon the very surface. And who were the Judges of the Court where the writ of error was depending ? Lord TENTERDEN, a Judge of great experience in criminal law ; Mr. Justice LITTLEDALE, an accomplished pleader ; Mr. Justice TAUNTON, and Mr. Justice PATTESON, learned and able men. Is it to be supposed that an objection so very obvious would not have been taken, either by the counsel at the bar or by one of those distinguished Judges, if they had thought such an objection tenable ? It is impossible to get rid of the authority of this case in the way proposed by the learned Baron.

Another case has been cited, *The King v. Rhodes*, (a) which was decided by Lord HOLT. It was an information for subornation of perjury. There were several assignments of perjury. An objection was taken at the bar, after * 317 the verdict, that some of those assignments * were bad.

What did Lord HOLT do ? He did not allow the question to be argued. He said, " It does not signify. If there be one assignment good, that is sufficient to support the judgment." It is said that this rule applies only to motions in arrest of judgment. But, my Lords, it would in that case have been the duty of the learned Judge to have heard the question argued, and to have given his opinion as to the alleged defects in the assignments, in order that when the judgment was entered up, it might not have been subject to reversal upon a writ of error. It is quite obvious, therefore, that in refusing to hear the validity of the different assignments of perjury argued, Lord HOLT must have considered that a general judgment upon the whole record, including the defective assignments, could not be reversed upon a writ of error. Such is, I think, the conclusion obviously to be drawn from this case, with respect to the opinion of that great and eminent Judge upon the point now in controversy.

(a) 2 Ld. Raym. 886.

A third case, *The Queen v. Ingram*, (a) has been incidentally referred to. That was a case upon a single count; a part of the count was defective; a motion was made in arrest of judgment; the Court decided that the defect was immaterial, as there was sufficient in the count to support the judgment.

In addition to these authorities, there is another class of cases upon writs of error themselves, all leading distinctly to the same conclusion. So much industry has been employed upon this subject that I do not believe any decisions can be found beyond those which have been already presented, either at your Lordships' bar or in the opinions delivered by the learned Judges. The first of this class of cases is *that of *Young and Others v. The King*, (b) upon *318 error. The indictment charged the defendant with obtaining money under false pretences; it consisted of four counts,—two upon the statute, which were sufficient, and two at common law, that were admitted to be altogether invalid. The judgment was entered up generally upon all the counts, and a writ of error was brought. First, then, what was the course at the bar? If what is now supposed for the first time to be the law had then been conceived to be so, would the learned counsel, a man of great experience in criminal cases, the late *Mr. Fielding*, would he solely have endeavoured in his argument to satisfy the Court as to the insufficiency of the two counts upon the statute? He would have said at once, "Here are two counts confessedly bad: the record has been completed: judgment has been entered up, a general judgment upon the whole record: this judgment must, as a matter of course, be reversed." Was that the course he pursued? Far from it. He entered into a laboured argument for the purpose of proving that the two counts upon the statute were also bad. What was the result? The Court ultimately decided that the two counts which had been the subject of argument were good. Two of the counts, therefore, were determined to be good, and two were admitted to be wholly untenable. A general judgment had

(a) 1 Salk. 384.

(b) 3 T. R. 98.

been entered up. This very question must, therefore, have presented itself at once to the Court. Here are two bad counts and a general judgment; how can such a judgment be sustained? Would so plain a point have escaped the learned counsel? But if he had overlooked it, would it have escaped the vigilance of the Court? Of whom was the Court

* 319 at that time composed? It is sufficient to *say that

Lord KENYON was the Chief Justice, and Mr. Justice BULLER, always distinguished as a most acute criminal Judge, was associated with him on the bench. It never occurred to those learned persons that such an objection could be sustained. What is the answer attempted to be given to this case? It is said that the judgment was a judgment of transportation, and could only have been supported by the good counts. The observation is not a little singular, for it raises a further objection; since, according to the principle now contended for, if all the counts had been good the judgment would have been erroneous, because it could be sustained by only two of the counts. It is impossible, I think, to resist the effect of this decision.

There is another authority which occurred about the same time, not quite so stringent indeed, but tending in the same direction. It occurred, I think, the year before. I allude to the case of *The King v. Mason*, (a) also a case in error. There was a good count, as it was contended, and a count admitted to be defective. The case was argued by a gentleman whom we all remember, an acute lawyer, remarkably conversant with every technicality connected with the profession, — the late *Mr. Marryat*. Instead of taking this objection, he confined himself, in a case of much difficulty, to labouring, with no little ingenuity and refinement, the question with respect to the validity of the remaining count, without any interposition on the part of the Court, or any attempt on his part to avail himself of the point which is now supposed to have been open to him, and to have been fatal to the judgment.

There was a case in the time of Lord ELDON, — I mean the

(a) 2 T. R. 581.

case of *Rex v. Hill*, (a) — which, though treated somewhat lightly in the argument, is, I think, deserving * of * 320 your Lordships' serious attention. The prisoner was tried at the assizes for obtaining money under false pretences; the indictment contained several counts; he was found guilty, and sentence was passed upon him. The judgment was general upon the whole record. The sufficiency of the indictment was reserved for the consideration of the Judges. One of the counts was decided to be bad; so that in that case, a highly penal case, there was a general judgment with one defective count. A writ of error would, therefore, according to the doctrine now contended for, have prevailed. What ought the Judges, then, upon that supposition, to have done? After deciding the question as to the sufficiency of the count in favour of the prisoner, they ought, as a matter of course, to have recommended a pardon. They did not, however, interfere, and the judgment was carried into effect.

These authorities must, I think, satisfy your Lordships of the correctness of the rule laid down by the learned Judges. It has received the sanction of Lord HOLT, one of the most eminent of our Judges; it has the express authority of Lord MANSFIELD, with the concurrence of the rest of the Court in its favour; it has been repeatedly confirmed since that period; and, although frequent opportunities have occurred for that purpose, it has never before been called in question, but has always been considered as a settled and established rule of law.

Some difficulties have been suggested to which it is supposed the rule would give rise, and to which I shall for a moment advert. One was, the difficulty which might occur in the case of a pardon as to a part of the charge. It is not necessary for me to make a single observation upon this objection, because all the Judges, even those who dissent from the * majority, consider that there is nothing in * 321 it. This supposed difficulty would equally arise in the case of an indictment with several counts where all of them were good. The argument, therefore, proves too much. There is no ground for the objection.

(a) Russ. & Ry. C. C. 190.

Another point which was insisted upon, was the difficulty in which a party would be placed in pleading *autrefois convict*. This has, I think, received a satisfactory answer from the learned Judges. In cases of this nature the sole question is as to the identity of the offence. It is a question of evidence; viz., whether the *corpus delicti* of which the party was before convicted is the same as that on which the second indictment is framed. That is a fact to be established by evidence. The rule will not be at all affected by the present case.

But it is said there has been no express decision upon the point in controversy; it is now for the first time presented for adjudication; it cannot, therefore, be considered as settled. If a question, then, be so clear, so well established, that no person, whether attorney, counsel, or Judge, ever entertained a doubt respecting it; if it has been uniformly acted upon, and constantly recognized; is it to be said, because it has not been the subject of express decision, that it is therefore not to be considered as part of the settled law of the land? The argument would lead to this singular conclusion, that the more free from doubt any point might be considered by the profession, the more uncertain it would become, because it would be less likely to be called in question, and less likely, therefore, to become the subject of any express decision. For many of the doctrines and principles which form part of the acknowledged law of the land, you would look in vain for any direct decision. Usage,

* 322 * admitted practice, recognition, are evidence of what the law is. These are the foundations upon which the common law rests. It has been admitted throughout this case, that never, till the present occasion, has any doubt been expressed upon the question. It is stated by the learned Baron, that he had always considered it to be a settled and well-established rule, and that it was with surprise he heard it disputed at your Lordships' bar. No case has been cited, no authority referred to, no *dictum*, no text-writer, for the objection which has now for the first time been contended for in this extraordinary case.

I earnestly advise your Lordships, therefore, to recognize

and adopt the opinion of the Judges. On a question of this nature, a point of technical law with which they are every day and every hour conversant, when you find a great majority of those learned persons, with that eminent lawyer the Lord Chief Justice of the Common Pleas at their head, pronouncing a distinct opinion, nothing but a case free from all doubt, a conviction amounting to certainty, can (may I venture to say it?) justify your Lordships in rejecting such authority. It is on these grounds, for the reasons which I have stated, on the ground of the uniform recognition of this principle as an admitted principle, and from the confidence you cannot fail to place in the opinions to which I have referred, that I counsel you to resist this objection. I shall trouble your Lordships no further upon this part of the case.

My Lords, with respect to the other objections, it is hardly necessary to say a word; and for this obvious reason, that all the Judges have concurred in opinion that they cannot be sustained. To one of those objections, however, I shall very shortly advert, because I believe my noble and learned friend, the Chief *Justice of the * 323 Queen's Bench, entertains a strong opinion upon it.

The objection to which I refer is that which relates to the jury,—the challenge to the array. The Court below has decided that the challenge to the array cannot be supported. The Judges whom you have consulted upon this occasion have come unanimously to the same conclusion.

My Lords, if you look into our law books, you will find that the challenge to the array is only allowed on account of some objection arising out of the position or conduct of the sheriff or other officer by whom the jury is returned. If the sheriff is unindifferent,—to use the legal expression,—if he is not equal between the parties, that is a ground of challenge to the array. If he is guilty of any default in returning the jury, that also is a ground for this species of challenge. Those are the only grounds of challenge to the array. They are of a personal nature, and are confined to the sheriff or other officer, whoever he may be, by whom the jury is returned. But in this case, there is

nothing on the record that imputes any thing whatever to the sheriff. He is not stated to be unindifferent. He is not stated to have committed any fault. It is not suggested that he is not equal between the parties, or that he has been guilty of any misconduct. There is nothing, therefore, upon this record which, according to the law as laid down by our best writers, can give a right of challenge to the array. There is no warrant or authority for extending the challenge beyond the limits which I have stated. Suppose, as it was put by the learned Chief Justice, the challenge to the array were allowed, the writ would, according to the established rule, be sent in that case to the coroner. What would the cor-

* 324 oner do? He must take precisely * the same course that has been pursued by the sheriff. He could not deviate from it. It is said that if this book be defective, recourse may be had to the book of the preceding year. I am satisfied, upon the construction of the Act, that such a course would be impossible. When no book has been made up, then the Act gives a power to refer to and adopt the last preceding book. But when, as in this instance, a book has been made up, the case is not within the Act of Parliament, and you are not entitled to select the jury from the former book. It is further to be observed, that it is scarcely possible, considering the number of jurymen whose names are contained in the jury-book for the city of Dublin, to suppose that mistakes must not constantly occur; and the consequence therefore would be, if you were to proceed according to the course now suggested, that when you came to examine the former book, you would find that also defective, so as to render it necessary to go still further back, until you discovered a book, if possible, free from objection. It is obvious that such a course of proceeding would be wholly impracticable.

But, we are asked, is there to be no remedy in a case of this nature? I am far from being satisfied that the Court might not have applied a remedy. If not, it is a defect occasioned by the change in the jury-law, and recourse must be had to the legislature. The only question now before us is, whether, according to the existing law, the challenge to the array can be applied in a case of this nature. Is this the

remedy which the law has pointed out for a defect of this kind? I am satisfied that it is not; there is no principle or authority to warrant it. To decide in favour of the objection would be to make the law, not to expound it. I should not have addressed myself at all to this point, had it not been for the * sincere respect which I entertain for * 325 my noble and learned friend (Lord DENMAN). The learned Judges have pronounced an unanimous opinion upon it, corresponding with the decision of the Court below; and I must say, with all the deference due to my noble and learned friend, to his character and station, that I think no reasonable doubt can be entertained respecting it.

Passing, then, from this part of the case to the several subordinate questions upon which the learned Judges have expressed their unanimous opinion, I have no reason to think that any of my noble and learned friends differ upon these points from those learned persons; and I shall, therefore, not enter into any discussion upon them. With respect, for instance, to the discontinuance, the answer given by the Chief Justice is satisfactory and sufficient. How could the continuance be entered up, consistently with the provisions of the Act of Parliament? I will not undertake to say whether a discontinuance in a criminal case would be cured by appearance. There is an authority, however, to that effect, which one of my noble and learned friends supplied me with during the course of the argument. I will not enter into the consideration as to whether or not it is necessary that continuances in criminal cases should be entered up after verdict. There is authority to show that in civil cases this is not necessary. I pass over these points, because I consider the answer given by the learned Judges to be conclusive.

Then, my Lords, as to the plea in abatement, and the demurrer to that plea, no person at all acquainted with the rules of pleading in criminal or civil cases can doubt that the plea of abatement is altogether vicious.

* Again, as to another point, a subordinate point, * 326 namely, as to the manner of swearing the witnesses before the grand jury: the Act of Parliament under the

authority of which this was done, speaks of a general inconvenience, and it applies a general remedy; it makes use of the word "all;" and the only question upon the construction of the Act is, whether its operation is to be limited because the terms are not equally comprehensive when the legislature points out the mode in which the provisions of the Act are to be carried into effect. It is clear to me that it is not.

My Lords, there are no other points that at present occur to me as requiring to be noticed. I have submitted to you the reasons why I think this judgment ought to be sustained. I am satisfied that you will, without difficulty, concur in the opinion delivered by her Majesty's Judges upon those points on which they are agreed; and I cannot bring myself to the conclusion, that on the remaining question, respecting which the great majority of the Judges have expressed a clear and decided opinion, and which has been met only with expressions of doubt and difficulty on the part of those who differ from them, that you will, in opposition to such a weight of authority, yield to those doubts, and give your sanction to the objections which have been raised against the judgment of the Court below.

LORD BROUGHAM.—My Lords, I must begin by expressing the great satisfaction which I have received from the able assistance given to this House by the answers of the learned Judges to the questions proposed to them. It was a fit and proper course to call in their assistance in disposing of
* 327 this case. We * adopted that course without any regard to the supposed difficulty of the questions likely to be raised before us. Indeed, no knowledge had then been obtained by us that any matter of difficulty or nicety would arise in the course of the argument; but we called in the Judges because the cause was one of great public importance: it was a government prosecution; it regarded an extensive conspiracy against the peace of the realm; above all, it was a political question, and one exciting great temporary interest among the parties which divide the country, and which also divide the two branches of the legislature. Nothing, there-

fore, could be more desirable than that we should, as far as was possible consistently with our duty, call in the aid of the learned Judges, and ask them how the points of law which might arise before us would be regarded and dealt with by them sitting in their own Courts, — those Courts from which are excluded all access to party feelings, whether of the one class or the other ; and all bias, whether from popular influence or the authority of the executive power ; those Judges who are placed by their exalted position and unsullied character above any such vulgar control, who occupy unmoved and serene those elevated heights,

“ Despicere unde queas alios passimque videre
Errare, atque viam palanteis quærere vitæ.”

We have had the benefit of their help, valuable in all cases, — in a case like the present, inestimable.

I agree, however, that we are not at all bound by the opinions thus given. We do not refer the question to their decision : we only ask them how, elsewhere, and by other Judges than ourselves, of great learning and large experience, and perfectly free from *all bias, certain * 328 points would be regarded and disposed of ; and we take their answers not as our rule, or even as our guide perhaps, but certainly as entitled to the greatest attention, and as a most useful help to make our going over a ground, confessedly slippery, satisfactory and safe.

But I will go a step further ; because I have heard it said that precedents, which might bind a Court below, are not therefore binding on a Court of Error ; and it is suggested, that some points, never having been decided by such a Supreme Court, may now be determined and disposed of differently from their determination in Courts subject to our review. With this doctrine I am unable to go along. Admitting in its fullest extent the difference between a decision or a precedent in a Court whence appeal lies, and a Court of the last resort, I consider it as clear that the highest Court is bound to view with the utmost respect the practice, and the decisions, and the precedents in the Courts below, as evidence of the law which we as well as those Courts ad-

minister; and only to overrule their decision when we find it clear, beyond all doubt, that they have mistaken the law. The difference is this between them and us; between the Supreme Court, and a Court from which lies an appeal: they might be convinced that their own former decisions were erroneous, and yet might feel bound by their own precedents; though cases are not wanting where they have got rid of those precedents and overruled them, but those are rare; whereas we are not bound at all when we see manifest error in the precedents cited, any more than when we see manifest error in the particular case at bar on which those precedents are brought to bear: but then our opinion must

be quite clear that the error has been committed;

* 329 * else a uniform course of precedents must, generally speaking, be admitted to make the law to us, as well as to the Courts below. By a single precedent, a single decision, we might not be governed; while they, generally speaking, would be. By a course of precedents, a course of decisions, and the long-prevailing opinion of the Judges and of the profession, we, as well as they, must be bound; and it would be very difficult to suppose a case of error so clear, so manifest, as would suffice to make us deviate from a course long and generally pursued by the Courts below.

That such has been the opinion of the profession and of the Judges, and that so general and uniform has been the course of practice in the Courts of criminal jurisdiction of this country upon the most important question now before us, that raised by the third and eleventh questions submitted to the learned Judges, — I feel it quite impossible to doubt. Here is a point, as it were a point of fact, upon which the best evidence we can have is the report on it of those learned Judges so long and so largely engaged in administering the criminal law, — lawyers who, like the Chief Justice of the Common Pleas, have for fifteen years sat upon the Bench; who, like another learned Judge, have been constantly engaged for forty years in Courts of criminal jurisdiction; or, like a third learned Judge, for above half a century: all of these testify that the opinion of the profession, and in conformity therewith, the practice of the Courts, has been to

consider a general judgment authorized by the law as good, which is given generally upon an indictment consisting of several counts, whereof one or more was bad, provided one or more be good; and that no difference can be taken between a case where the punishment is fixed by law, and one where it is left to the * Judge's discretion. * 330 To this practice other Judges bear the same unequivocal testimony with those three whom I have cited. Those learned Judges agree in holding that the sentence pronounced is not to be taken as the aggregate amount of the several sentences on each one count, but as one sentence on the offence, differently charged in the different counts. Mr. Justice PATTESON says, that he believes this is the first time that a contrary notion has ever been ventilated; and he says, that the universally received opinion has been in favour of the proposition, or rather assumption (for it never was drawn into any controversy), that one good count would sustain a general judgment on the whole indictment.

But it is material to observe that Mr. Baron PARKE himself, who dissents from the opinion of the great majority of his brethren, does not dispute this; indeed he seems in terms to admit it. Ever since he came into the profession, he says, the distinction between civil and criminal cases in this respect has been considered by him to be a well-established and settled rule. He adds, that it was with some surprise, certainly, that he heard the proposition disputed at our bar in this case, for the first time in his professional life. Though he doubts the correctness of the rule to the extent stated, he does not at all deny or even doubt the existence of the rule; he only doubts whether it may not have been carried too far, by some misunderstanding of the *dicta* of Judges in dealing with motions in arrest of judgment.

By the great majority of the learned Judges the existence of the rule is not merely admitted, indeed by all except Mr. Justice COLTMAN, who says nothing distinct on this point, but all, with two exceptions (most respectable exceptions, doubtless), agree in holding the rule to declare correctly the law upon the subject. Mr. * Baron PARKE is the only * 331 one who, at great length, enters into objections against

it. But it is to be remembered, that while the other Judges have given a clear and unhesitating opinion the other way, the learned Baron expresses himself with much hesitation, and in the form more of grave doubt than of a clear opinion. He says, no less than eight several times, that he doubts the position. His language is this: "I cannot help doubting, to say the least;"—"I am inclined to pause, and to doubt whether I ought to answer the question in the affirmative." After going through the cases, he says, "The result of this examination is that I doubt whether the received opinion—(that he admits to be the received opinion)—is so established by usage, though generally entertained, as to compel its adoption in the present case." Again he says, "I feel so much doubt, that I cannot bring myself to concur with the majority of the Judges." Finally, he concludes by giving his own opinion in the negative; but adds, "I can by no means say that I am free from doubt," in consequence of the majority of his learned brethren differing with him.

Now it must be observed, that the fact of these doubts not existing in the opinion of the greater part of the learned Judges, gives that opinion a greater weight; and that the doubt expressed by the learned Baron to a certain degree diminishes the weight of the authority of his contrary opinion.

The Judges have unanimously held two of the counts, the sixth and seventh, to be invalidly framed, and insufficient to support a judgment. I feel the greatest reluctance to differ with these learned persons, but I am bound to state the inclination of my opinion. Their arguments, as delivered by the learned Chief Justice, have failed to satisfy me

* 332 that * an offence is not set forth with sufficient certainty and precision in these two counts. Perhaps I ought rather to say, that I retain so much doubt (taking the language of the learned Baron upon another point) as to feel unable to agree with them, because the Latin form of the word "frightening," or impressing with terror or fear, seems quite precise, and the object to be gained by such use of intimidation, or frightening, or fear, seems to show against whom the fear must be intended to operate. A change in

the government and constitution could only be obtained either from Parliament, or in spite of Parliament; if from Parliament, then the fear must be impressed on Parliament; if not from Parliament, then large meetings for obtaining such changes otherwise than by Parliament, whether with or without the use of terror, are unlawful. But I mention these as grounds of doubt, rather than of any opinion which I have formed; and when I find all the learned Judges, who have had so very much greater experience in Courts of criminal jurisdiction than any I ever can have had, entertain a clear opinion the other way, I am bound to suppose that I am wrong in my doubts, and I can in no way set up my opinions against theirs; my inexperienced judgment upon such a point, against their experienced and clear opinion: and I should say the very same thing, if upon the other part of the case to which I have referred, that of the answer to the third and eleventh questions, I felt inclined to doubt with the learned Baron (who only doubts), when seven Judges hold a clear, undoubting, and unhesitating opinion the other way: I should certainly in that case have no confidence in my own doubts; and if called upon to look at the doubts of that learned Baron, I should set against these doubts, the clear, *and unhesitating, and un- * 333 doubting opinion of his seven learned brethren.

But it is wholly immaterial to what opinion I may have arrived upon the sixth and seventh counts, because the point stated in the third and eleventh questions is sufficiently raised by the finding of the jury upon the first four counts being allowed to be bad; and I entirely concur in the opinion expressed by all the learned Judges, that these findings cannot be supported. My noble and learned friend reminds me that the *nolle prosequi* upon the fourth sets it right; but one is enough. Now it is clear that a bad finding upon a good count is equally incapable of supporting any judgment with a good finding upon a bad count. Therefore the point in the third and eleventh questions which your Lordships have put, is as well raised by the finding on these first three or four counts being held bad, though the counts themselves be good, as it is by the sixth and seventh counts being held

bad, on which sixth and seventh counts the findings are not objected to.

I come, therefore, to the point, and the only point, of difference among the learned Judges; namely, that raised in these two questions, the third and the eleventh; and I have already stated the great difficulty which I should have on such a point as this, a practical point, in differing with the clear and unhesitating opinion of so large a proportion of the learned Judges; testified also, in common with them, by the learned Baron himself, to be the opinion of the profession, and one which has been acted upon by all the Courts. But my opinion, in fact, goes entirely along with theirs, and would be the same were I deciding the causes without their assistance.

In approaching this question, the first thing which
 * 334 * strikes us, is that prevailing opinion stated by all the learned Judges as quite universal in the profession, and admitted to be so even by those who dissent from the conclusion at which their brethren have all arrived; insomuch that Mr. Baron PARKE cannot avoid recording the feeling of surprise with which his mind was impressed upon hearing its soundness for the first time questioned at your Lordships' bar. But it is not merely the prevailing opinion against which we must run, if we declare that it is all error and delusion; the practice has been conformable to the opinion. Can any thing be more desirable than that this practice should, if possible, be upheld and countenanced? Can any thing be more undesirable than to declare it all wrong? I will go further: Can any thing be more appalling than the course recommended to us, of declaring, by this day's judgment, that in all those cases without number in which, on a verdict with several counts, one whereof only is bad, sentences have been passed generally, and those sentences executed, every one of them must have been reversed and no execution done thereupon, had a writ of error brought them before the tribunal of the last resort? I must confess my insuperable reluctance to join in such a proceeding, and put forth such a declaration of the law. I must see far more clearly that all has been error and delusion below before I can so declare it;

I must see far more serious inconvenience as incident to the practice so established and so sanctioned, before I can consent to incur the inconveniences of such a reversal; and I must have more than doubts, even grave doubts, on my mind, to justify such a step. And when I find the sages of the law, in whose hands its administration is now placed, pronouncing, by so large a majority of their number, * a * 335 clear opinion, deliberately formed, that the universal doctrine is sound, and the general practice right, — it is not because one of that number, how respectable soever, feels difficulty in concurring with them, and “cannot help doubting,” and is “induced to pause,” and then gives a doubting opinion the other way, that I can go along with him in pronouncing his learned brethren, and his equally learned predecessors, all to be in the wrong, and the practice of ages to be unsanctioned by the law of the land.

But it is said that the opinions which these learned Judges themselves have expressed of the practice, and which their venerable predecessors have before them given upon this point, must be received with qualification. And, first, we are told that the case is so far new as to have never been decided, at least upon argument raising and supporting the point. On which I take leave to ask, how much of the known and admitted law of this country, in which the books abound and by which the Courts are guided, would be struck out and cease to rule us, were all struck out on which no decision has ever been formally pronounced? A doctrine may be without any decision to support it expressly, because it never has been denied; it may rest on no cases but on the common understanding of the profession, precisely because it never has been brought into doubt. Again, when it is said of some cases quoted, “the point never was made, the objection never taken,” I answer, first, that we now know what would have been its fate if taken. We have the majority of the Court here present, which decided some of those very cases; the objection has before them now been taken; before them argued; by them disposed of: and therefore it is no * speculation upon probability, but a positive fact, of * 336 necessity true, that if that very objection had, in those

very cases cited, been urged before the Courts below, in those Courts it would have been overruled ; and this remark with which I am now dealing, in impeachment of the authority of those cases, would therefore have been displaced.

But I answer further, that whether taken at the bar or not, really signifies nothing ; for it was the bounden duty of the Court to take it, as the facts raising it lay upon the very surface, as my noble and learned friend has well observed ; and it was their bounden duty to refuse affirming a sentence which was exposed to so manifest and patent an objection. They could not have affirmed the sentence without admitting that they themselves would have pronounced it, and that they themselves concurred in its legal validity.

But then it is said that this observation applies, in a certain degree, to decisions given upon motions in arrest of judgment only ; and that these, standing upon a different footing from decisions on writs of error, have not the same weight as authorities.

Now, I answer, first, that some of the cases to which I refer are upon writs of error, and not upon arrests of judgment, — a topic to which my noble and learned friend has already referred : secondly, I answer, that I cannot go along with those who give no weight to the decisions on motions in arrest of judgment. I hold them as evincing, and as very clearly and very certainly evincing, the opinion of the Court on the point ; as showing, and very clearly showing, that the same Court would have given the same judgment had the matter come before it in error on the record of the judgment,

* 337 and not by way of motion to * arrest it. My reason is this, that I cannot conceive any course more absurd, and therefore more difficult, not to say impossible, for a Court to take, than the one which these Courts are by this argument supposed to have taken ; nay, must necessarily be admitted to have taken, if the distinction now pressed, and with which I am dealing, is of any avail in the argument. For to what does it amount ? Neither more nor less than to this, that the Judges, in refusing the motion in arrest of judgment, say, “ We will not arrest the judgment, but we will pronounce a judgment which is naught, and which we know a Court of

Error must reverse as a matter of course. We in the King's Bench will not arrest; but on the other side of that wall, the Court of Exchequer Chamber will reverse the judgment we give." Observe, the course taken on these motions is not said to have been to refuse the arrest of judgment, but to admit the count to be properly objected to, and declaring it bad, to enter the judgment on the other counts. No such thing. The general course was, to keep the judgment entered generally, to refuse to alter the entry of the judgment, to refuse the motion, to confine the judgment to the good counts, and to refuse entering it upon the bad. The refusal of the motion for the arrest of judgment had the effect, or at least the intention, of keeping the judgment entered generally upon all the counts, because the ground of the refusal was, that arresting the judgment was useless, inasmuch as there were other good counts upon which it might equally have been given as upon the bad ones. Then the inference is irresistible, that the Court must have held this general judgment to be a judgment upon the good counts as well as upon the bad; on each and on all; or, rather, on each than on all; on

* each severally, and not on all conjointly, — a judgment * 338
severable and sustainable by the good counts to which it applied; and they must have held that it could not be reversed on error, else they must have granted the motion, and confined the judgment to the good counts. It is beyond all possibility of one's imagination to suppose that the same Court, if sitting in error, that is the Court which dealt with the motion in arrest of judgment, and refused to arrest the judgment, that that same Court, if sitting in error, would not have given the very same judgment; that it would not have held the judgment good which they refused to arrest.

Let it further be observed, upon this important part of the argument, that when motions in arrest of judgment have been refused, the Courts have never given a decision that the counts objected to were bad. They have only said, "Be it so; be they ever so bad, there are good ones, and that is enough, and therefore we will not arrest the judgment." Now, in every case the badness was such as could not be denied. Then just consider what must be the course taken

by the Courts had the law, now for the first time propounded, been the law then acknowledged and received by them. The defendants had only to bring their writ of error the moment the judgment was entered up generally,—as it must have been, because no decision was ever given to confine it, no decision was ever given to pronounce one count good and another bad, and to say which were the good counts and which were the bad,—and then that judgment on a writ of error so brought must have been reversed. But what was the fact? We know it is admitted on all hands that no writ of error was ever brought in any of those cases, before the present. Can any thing more demonstratively

* 339 * prove that in every one such case such was the opinion of the profession; of the parties as well as of their advisers, and of the Courts too? It is not to be forgotten that we have the *dicta* of such venerable Judges as Lord MANSFIELD and Lord Chief Baron EYRE, distinctly recognizing the doctrine now first impeached; while it must be observed that we have no *dictum* on the other side, no opinion or authority of any text-writer quoted, and no case whatever cited to support that doctrine.

The learned Baron objects to some of those cases; he expresses doubts whether others do not go further; all which cases and all which authorities are on the side against which he contends: but the learned Baron, admitting that all those cases, whatever weight they have, throw that weight into the scale against which he is contending, supports his opinion, perhaps I ought rather to say his doubts, by citing no case, by citing no authority, by citing no *dictum*, either of a Judge or of a text-writer, on behalf of his argument.

Reverting to Lord MANSFIELD's *dictum* upon the subject, which I admit not to be a decision, it may be questioned whether he was correct in his regret that the law differed in civil and in criminal cases; because as long as juries give their verdict in the present way, and our proceedings are framed upon the present plan, it is difficult to perceive how any other rule could well be adopted. But at all events the manner in which he refers to criminal proceedings and to the rule then established is free from all doubt and all objection,

and nothing can show more clearly than his language does, how fixed and undoubted a principle he considered it to be in the criminal law. Indeed he states it as distinctly * in *Peake v. Oldham* (a) as he does in *Grant v. Astle*. (b) * 340

But the cases decided, whether in arrest of judgment or on error, naturally deserve more consideration as authorities than these *dicta*, though to these *dicta* great deference is naturally due. It is needless for me to go through all those cases, because I have already dealt with them, so far at least as to show that the distinction will not avail which has been taken between the decisions on arrest of judgment and the decisions on writs of error. But on the latter class of cases — I mean those on writs of error — I must be permitted to dwell a little longer. That of *The King v. Mason* (c) was on a writ of error in the King's Bench, on an indictment consisting of counts, two of which were clearly bad, and shown to be so; and this case is always held to rule that counts so framed are bad; namely, that in setting forth the obtaining of money or goods on false pretences, it is necessary to specify what those false pretences are, otherwise the counts are bad. Now, the judgment here was on the whole indictment, and the punishment was so far discretionary, that either imprisonment or transportation might have been awarded; and therefore the argument used in the present case might have been urged there, that the bad counts might have caused the one judgment to have been given rather than the other. The point was a very few months afterwards brought before the Court in the case of *Young v. The King*, (d) and which was decided by that Court; Lord KENYON and Mr. Justice BULLER being among the learned Judges who composed it. Upon this case two observations are made at the bar, and by the two learned Judges * who differ with their brethren. One * 341 of those observations is, that the objection was not taken. But to this I answer, first, that the badness of the count was distinctly pressed upon the Court, and was the

(a) Cowp. 275.

(b) Doug. 780.

(c) 2 T. R. 581.

(d) 3 T. R. 98.

ground of the application to reverse the judgment; the Court, therefore, was well aware that one count was bad. Then I next observe, on the objection taken, that the counsel not taking the objection signifies nothing, if the Court knew that they were dealing with a general judgment on an indictment containing a bad count; for it was, beyond all possibility of question, the duty of the Court to take the objection which they saw the counsel had overlooked, and to say, "This judgment cannot stand, for it is general, and one count of the indictment is bad." The Court did not so declare; and therefore I hold the objection not having been taken at the bar, to raise a point which the Court could and ought to have raised, is immaterial. The case clearly proves the Court's opinion to have been against the present contention.

The second observation which is made in impeachment of the authority of *Young v. The King*, and which indeed is also extended to *The King v. Mason*, is, that there the punishment was fixed; namely, seven years' transportation. Now, as this most clearly is not sufficient to show the punishment fixed, those who use the argument are obliged to say, the punishment of transportation for seven years is fixed. But what signifies that? There were two punishments open to the Court. The transportation—if you transport—is fixed for seven years. No doubt of it; but what signifies that? There were two punishments open to the Court; either imprisonment or transportation. True, if they elected between the two, to transport rather than to imprison, they were

* 342 limited to one period. But the question before * them was not: Shall we on this indictment, one count of which is bad, transport for more years or for fewer? But the question before them was: Shall we on this indictment, of good and bad counts together, imprison, or shall we transport? And can it be denied, that in solving this question the same argument applied, drawn from the different counts being some good and some bad, which argument is pressed upon us in the present case? Most certainly, therefore, *Young v. The King* is a precise authority notwithstanding this objection.

These arguments apply, perhaps, still more forcibly to *The*

King v. Powell, (a) on a writ of error from the Quarter Sessions to the King's Bench. There were two counts in the indictment, and on the offences laid in them different sentences would be given. One was for an assault with an intent to commit a rape ; the other was for a common assault. The verdict was, " Guilty of the misdemeanour and offence aforesaid." And if these words were not *nomen collectivum* the judgment must have been bad, because it would have been uncertain on which count that judgment had been given ; and one count, that for a common assault, would not have supported a sentence of imprisonment and hard labour. But the Court held the words to be *nomen collectivum*, and thus applied the verdict to both counts. Now, had the doctrine here contended for been at all well founded in the opinion of the Court, it was bound to reverse the judgment, because some part of the imprisonment and labour would have been applied to the count for common assault, which would not have supported the sentence of labour. Yet the party never took this objection, and the Court never took it. Had it been taken, we now know what the result would have been ; because the same Judges who overlooked it, or rather who * are said to have overlooked it, have here, * 343 on grave argument, decided against it.

It is to be borne in mind, as Mr. Justice MAULE has observed, that, generally speaking, the sentence on convictions only proceeds so far on the evidence at the trial, and on the verdict which was built upon that evidence, as to point out the species of the punishment, and no more. In meting out its *quantum*, the Court may look, and does look, beyond both the verdict and the evidence. The Court, in pronouncing the sentence, takes other matters into its consideration, and its sentence cannot come before a Court of Error for review. The record must be so framed that there shall be a good finding on a good count, to justify and support a sentence of that species. The manner in which the sentence is framed in respect of amount is immaterial, the punishment being such

(a) 2 B. & Ad. 75.

as the law warrants of an offence so laid, and on a conviction so had of that offence.

My Lords, I therefore, when called upon to pronounce my judgment, among others of your Lordships, in this case, find myself, with my noble and learned friend, in this situation: The whole of the learned Judges, as well those who in technical points differ, or rather have their doubts and pause before they concur with their brethren, as those who agree on those points, all with one voice declare that upon the merits they have no doubt at all; that upon the great merits and substance of the case they are unanimously agreed. That a great offence has been committed, and an offence known to the law; that a grave crime has been perpetrated, and a crime punishable by admitted and undoubted law, — all the learned Judges agree. That counts in the indictment, to bring the criminals, the offenders, to punishment, are

to be found, against which no possible exception,
 * 344 * either technical or substantial, can be urged; that those counts, if they stood alone, would be quite sufficient to support the sentence, and that the sentence is one which the law warrants and justifies, I may even say, commands, — upon these, the great features, the leading points, the essence and substance of the case, all the learned Judges have a clear, unanimous, and unhesitating opinion. But there happen to be in the indictment two counts on which a doubt arises in the minds of some of the Judges, though not in the minds of the great majority, whether those, technically speaking, being ill-formed, a general judgment on the whole, good and bad together, can stand. With this question we have now been dealing, and with this only. The learned Judges heard it argued with a degree of elaborate learning, industry, and ingenuity, which I have never known exceeded at the bar of this or of any other tribunal in which I have either practiced as an advocate, attended as a spectator, or presided as a Judge. Upon the result of that elaborate and learned argument, so ably and so zealously urged, the learned Judges have taken time to consider for weeks; they have conferred together again and again; each has heard all

that his fellows had to urge; each has had the benefit of all the doubts which his brethren had to suggest; and the result of the whole is, that seven out of the nine pronounce an opinion that there is nothing in the objection, and that, notwithstanding the technical informality of those counts, the judgment must stand, and would, if it were before them in their Courts, be refused to be reversed. Two of the learned Judges give a contrary opinion; one, at least, a contrary opinion, and another says he cannot concur in the opinion of the majority, on account of the doubts which weigh and press upon and obscure his mind. We are now called

* upon to elect between these two courses. The ques- * 345
tion is, whether we shall take our information upon the law, as laid down by those who daily and hourly are administering it, from the seven or from the two. It is the usual course for men, when they consult others in whose judgment they place great and just reliance, — those in whom they confide for their integrity, for their impartiality, for their acting without a bias, which often the person consulting finds that his own mind and his own feelings may not be free from, — it is the common course, consulting several, and finding a discrepancy among those persons consulted, to weigh a little the grounds which they give. But, above all, it is the common course of rational and sensible men so in difficulties, and so consulting in their difficulties, to see whether the great majority are the one way or the other; and when they find the great majority to be one way, and a small minority the other way, this of itself produces naturally a leaning towards that course, and towards adopting that counsel, which the greater number recommend. But that leaning, how incomparably is it increased, if they find that the seven have a clear opinion, and the other two only doubts; that the seven do not hesitate, do not pause, have no obscurity in their vision, but clearly as well as unanimously are all one way, and have not a doubt in their minds? This being the case, it is a natural thing for me, as a person consulting them, to take rather the clear opinion of the great majority than the doubting, uncertain, and hesitating opinion of the small minority. It is a case in which I for one — unlearned, so to

speaking, by comparison with those learned Judges, though I have practiced in courts of criminal law as well as in

* 346 Courts of common law, like most of my learned * and noble friends here — have no right to set up my judgment and opinion against an opinion and judgment formed upon such materials, by such men, strengthened by such talents and learning, and, above all, fortified and instructed by such large and long-continued experience as they possess.

But, my Lords, upon one subject none of them hesitates; even Mr. Baron PARKE's doubts do not continue on his mind here. All the nine learned Judges together tell me that this is the very first time that such an objection was ever taken; and that all lawyers, and all Judges, and all Courts, have hitherto overlooked it, or, rather, have hitherto acted upon the supposition that it was untenable; and have never taken it, and have never acted upon it, but have always acted upon the contrary doctrine being the law. That is a great assistance to me in forming my judgment. I then call for authorities the other way, but I call in vain; for while the learned Judges who are for the practice of the law as it stands; while the learned Judges who will not change the law, but who will continue to countenance and support it, and who say that it is right as well as existing; while they produce cases decided, and *dicta* of Judges, and authorities of writers, and the opinion of the profession, — on the opposite side, against the law, and in favour of the law which we are required for the first time to set up, pulling down the former law, there is not one *dictum* of a Judge, one sentence of a text-writer, or one shadow of a decision to be brought forward.

This being the case, it appears to me that I have but one course to take in dealing with the question so propounded to me; that is, to take the safer, the surer, the better course;

to say it is good, *stare decisis*, to go with the weight of * 347 authority and decision, * and to take the opinion, as my guide, or at least my helpmate, of those learned Judges whom we have called in to our aid, and who are so well informed upon the subject, and so perfectly impartial in dealing with it.

My Lords, I now come, lastly, to say one word upon the point with which my noble and learned friend concluded his very able address, — I mean upon the important question of the challenge to the array, on the ground of the omission of a certain list, somewhere or other, by some person or persons unknown, and not disclosed upon the face of the challenge. And here the learned Judges are quite unanimous, as I understand ; at least we have had no objection taken by any of them before us, upon this ground.

Now, I no doubt feel very strongly the importance of this subject, and I feel it for this reason : the objection goes to the jurisdiction of the Court in the matter ; the Court is composed of a Judge and a jury for the trial of prisoners ; that Court consists of one permanent high officer, having jurisdiction, and of others who are not permanent. It consists of the Judge and of twelve lawful men. Those men have jurisdiction given to them by the law of this country, in respect of their being selected after a particular manner ; and if they are not selected in that manner, they are not a body having the jurisdiction which the law vests in them if well selected ; consequently, the question always is, “ Have they been so well selected ? ” For if they be not well selected, they are not the body invested with that jurisdiction, clothed with those high judicial attributes of being necessary assistants to the Judge upon the trial of the issue. Therefore I very much listen to any argument which would invalidate the array, or go to impeach the constitution of the jury as not having been properly selected.

* But then, my Lords, I must here again go upon * 348 the course of the law and the enactments of the statutes ; and the manner must be considered by me in which this objection to the constitution of the jury has been taken and is now before us, after being taken and disposed of below. It was by a challenge to the array, setting forth the malconstruction and formation of the jury. To that challenge there was no issue taken, but there was a demurrer, which admitted the fact of there being a panel of fifty-nine names omitted, out of seven hundred and odd. Now, a challenge to the array I always understood to be a challenge to

the array in respect of the unindifferency of the returning officer, the sheriff or any other returning officer who may have returned the panel, or in respect of the malpractice of him, or of any other returning officer, or of any thing done in respect of that panel by those officers which gives a right to the party to say, "You have erred;" or, "You have misconducted yourself." But no authority whatever has been cited to us in the argument; there is no ground of authority or decision or enactment to show us that the mere omission can validly or competently be made a ground of challenge to the array; which is the question, and the only question, raised by the demurrer.

Now, my Lords, I must say that I go entirely along with the learned Chief Justice in his view, and with the view of my noble and learned friend on the woolsack, of what would be the consequence of allowing this challenge to the array. It would be neither more nor less than this: that for twelve months you must go without either a common jury or a special jury, because you have this book imposed upon you; you cannot get rid of the book. Oh! but, it is said, you may get

rid of the book. First, it is said that the recorder in * 349 this case, with whom the * error is stated to have originated, the returning officer, is ministerial; that it is his error or misfeasance or wrong, and that he is not judicial. But he is judicial. He is to hear and determine, and then he is to make up the book, which is only consequential upon his judicial act of hearing and determining; he does not cease to be judicial at the end of the day, any more than a Judge ceases to be judicial when he signs the sentence or order after having pronounced it, or when he takes the proper steps after having exercised his judicial functions. But then it is said, in answer to the Lord Chief Justice, that they are not without remedy in this case, because they may go to the last year's book. Now, what does the statute say as to the last year's book? The statute says, that if there is no book made up, you may go to the last year's book; and when you have gone to the last year's book, you may find just the same sort of nonfeasance or misfeasance tending to make that book invalid. So that you would never get a good jury panel at all,

and trial by jury would in reality be suspended, if not abolished. But do the words of the Act, "if there is no book made up," apply to a case where there is a book made up, but where a name is left out? For if this argument be good for fifty-nine names being omitted, it is good for a single one being omitted; it is exactly the same thing. I must say, that I think it would be going a prodigious length, indeed, to hold that the omitting of one name, in whatever way, from the jury panel, would make a case that no book was made up, and render it competent to the parties to go back to the last year's book. My opinion, therefore, is most decided, that there ought to be no *venire de novo* upon this ground; and here all the learned Judges, without exception, are agreed.

* I should say nothing further but for one observa- * 350
tion which I have heard made, upon the great hardship which has been sustained by these traversers, in having endured a partial execution of the judgment pending this writ of error. I have only to say, that the law of the land is so; it cannot be otherwise. And those who most thoughtlessly, and, I think, every thing considered, most improperly, have publicly expressed an opinion that the Crown must have lost the power of bestowing mercy and the power of pardoning, if it did not exercise it upon this occasion, totally forget that if the Crown had pardoned pending the writ of error, it had no power of incarcerating if the judgment was affirmed; and consequently it would come to this, that in every case of misdemeanour, without exception, no punishment could possibly be inflicted, because the person has only to prosecute a writ of error, during the pendency of which he must be pardoned; and if the writ of error be decided against him, then the Crown, having pardoned, would have no power of inflicting punishment. And then there is also an end, as appears to me, to all criminal law; for in every case you may bring a writ of error, and so prevent the possibility of the sentence being carried into effect. Whether the law should remain as it is, may be another question. I agree with those who think that it may very well, and very reasonably, be altered.

My Lords, I have now performed my duty to the best of

my ability. I have given to this question as much attention as it was possible for me to give. I wish that I could have brought to it more ample stores of learning. My experience, during my practice at the bar, having been much more limited in Criminal Courts than that of many of my noble
 * 351 and *learned friends here, I have been bound to look to authority, and respectfully to consult those learned Judges who are most capable of supplying my deficiencies. With these feelings of respect I have consulted their authority; and upon the grounds which I have stated to your Lordships, concurring in the views of the majority of those learned Judges whose assistance we have had upon this occasion, I have arrived at the conclusion which I have now attempted to state; that conclusion being in favour of my noble and learned friend's proposition, that the judgment should be for the defendant, and against the plaintiffs in error. .

LORD DENMAN. — My Lords, in considering the important questions which are involved in the case now before your Lordships, it appears to me convenient to advert, in the first place, to that which has been last argued by my noble and learned friend who has just sat down, — I mean the objection to the judgment given by the Court below, allowing the demurrer to the challenge to the array. I am induced to begin with this subject, not only because it is preliminary in the course of the proceedings, but because I think it is important, to a degree which does not admit of exaggeration, to the administration of justice throughout the United Kingdom; and that, if it is possible that such a practice as that which has taken place in the present instance should be allowed to pass without a remedy (and no other remedy has been suggested), trial by jury itself, instead of being a security to persons who are accused, will be a delusion, a mockery, and a snare.

The traversers challenged the array, on account of the
 * 352 fraudulent omission of fifty-nine names from the *list of jurors of the county of the city of Dublin. The Attorney-General demurs to that challenge, admitting thereby

that that fact has taken place. It appears to me that that challenge ought to have been allowed: that was the opinion of one of the learned Judges of the Court of Queen's Bench in Dublin,—an opinion stated by him with the diffidence which becomes one who differs from his brethren, but at the same time stated with firmness and perspicuity, and for reasons which, I venture to think with great confidence, received no kind of answer from the learned Judges who formed the majority of that Court. Speaking with the same diffidence, I disagree with the opinion which then prevailed, and which has been repeated by the learned Chief Justice upon the present occasion, speaking herein for himself and all the other Judges who attended the consultation at his house. I think that the principle laid down in that opinion is not correct. With deference to him and to my noble and learned friend on the woolsack, I think that the principle of challenge to the array is not confined to the narrow issue, whether the sheriff has done wrong, but involves that larger question, whether the party has had the security of trial by a lawful jury of his country.

I feel it to be a great misfortune to differ from all my learned and respected brethren who have been consulted on this subject; but I confess that that regret is in some degree diminished, so far as my own position stands with reference to this matter, by a circumstance which I must be allowed to state; and as I have put it in writing (because at one time I thought it ought to have appeared upon your Lordship's minutes), I shall take the liberty, with your Lordship's leave, of reading that statement. When the Judges

* are consulted by this House upon any case submitted * 353
to them, it is not usual for such Judges as have the honour of a seat in your Lordship's House to attend their consultation; but I was so much struck with the immense importance of this present question, and so entirely unconvinced by the reasoning of the learned Judges in Dublin, that I felt a strong desire to ensure the benefit of a full discussion of that point; and I accordingly wrote to my brother COLERIDGE, several weeks ago, thinking that he would attend that consultation, and would submit that point to the learned

Judges. Most unfortunately, however, he was prevented by illness from leaving his room, but he wrote his opinion upon the whole subject, — sending one copy of it to the Lord Chief Justice, and another to myself.

“I answer this sixth question,” he says, “with much doubt, being wholly unable to look into the authorities, and knowing that I differ in opinion, so far as my opinion is formed, from my brother PATTESON. It seems to me that all questions touching the formation of juries must be examined by the Judges with very critical eyes. Taking the facts from the challenge of one of the traversers, and dismissing all other knowledge, it must be admitted that the recorder has sent no general list, as required by the statute, to the sheriff; that by some persons unknown a spurious list has been transmitted, omitting the names of many qualified special jurors; that this has been done fraudulently, with intent to prejudice him upon his trial; that from that spurious list the juror’s book and special jurors’ list have been made, and the present array selected; and that the traverser himself is wholly unparticipant in this fraud, and protested against the array being constituted from the list so framed. Here,” he pro-

ceeds, “is a confessed and serious wrong; and the

* 354 * only question is, whether a challenge to the array be the proper remedy. It is said, first, that the sheriff is not in default; and, secondly, that if the challenge be allowed, no better materials can be found for the array, for the book now formed is by law the book from which any other jury must be selected. With great deference, I submit that neither of these is an answer. Suppose at common law a challenge to the array,” — and then he puts a particular case in which the sheriff may have made an imperfect array, and yet not have been guilty of any default at all; and he says, “yet I apprehend the array would have been quashed. So here, the sheriff may not be in default, but still, if the materials for a jury have an inherent defect in them, the defendants are not to suffer, but the challenge ought to be allowed.” Then he answers the second argument by observing, “the only consequence is, that the trial may remain untaken;” and he expresses in strong language his own

opinion, that far better it were that no trial should be taken under those circumstances, than that it should be taken subject to the heavy suspicion which these facts must involve. He further observes, "It is to be considered whether, as the recorder has sent no list to the sheriff, there is any book made up for the year; and whether, therefore, the book of last year is not that from which juries ought to be taken. That the fraud is not charged upon the prosecutor is, in a criminal question, quite immaterial. Upon the whole, I confess I think that, dealing with modern legislation upon the subject of the returns of juries, we ought to consider all those officers who now take any part in what would have been the sheriff's duty at common law, as included, for the purpose of challenge, under the term 'sheriff.' I repeat, that I submit this with the greatest diffidence."

* On Monday, when the learned Chief Justice stated * 355 to this House the entire agreement of all the Judges on this point, and afterwards the agreement of my brother COLERIDGE with himself and then upon the other points, I did not think myself justified in alluding to that letter, because I rather concluded that my Lord Chief Justice had had a subsequent communication with my brother COLERIDGE, in which he might possibly have seen some ground to alter his former opinion; but when I left your Lordships' House I found upon my table, on my return home, another letter from my brother COLERIDGE, written the day before. I had stated to him my general views upon this subject; and in this second letter, after repeating what he had before said, that he thought the argument in favour of overruling the demurrer was too technical for the decision of a great constitutional question, and stating again the view he took of the balance of conveniences, he says this, — the note is written by his son, as he himself unfortunately is not at present able to write, — "He is much struck by what you have written on the question of challenge; and at present, like your Lordship, awaits the better arguments that are to be adduced on the other side."

Now I have a right to state, that I do not stand in the unfortunate position of being alone among the Judges, in not

thinking that any thing may be done with any panel out of which a jury may be drawn, and that there is no redress for the injury which may be so inflicted. I venture also to think, as I believe my learned brother COLERIDGE will think, that those better arguments have not yet been adduced.

My Lords, I shall shortly notice the reasoning employed in the Court below upon this subject. There was originally, perhaps, some notion that the challenge * to the array was taken away altogether by the present Jury Acts, 6 Geo. 4, c. 50, for England, and 3 & 4 Will. 4, c. 91, for Ireland; but that clearly is not the case, because there is in each a particular provision which preserves the right of challenge to the array, — sect. 28 of the former, sect. 21 of the latter. I do not trouble your Lordships with the particulars of that argument, because it is not now doubted. It was also a question whether a challenge lies to the array, where a special jury has been struck, because the consent of the party might have got over any previous difficulty: but it having been already held by Lord TENTERDEN and the Court of Queen's Bench in England that such a challenge does lie, I do not think there is any great impropriety in supposing that that is equally free from doubt; and I cannot question that, in the case of a special jury also, a challenge to the array may be entertained by the Court.

My Lords, the next point is, that upon which both my noble and learned friends have proceeded; namely, that the principle of a challenge to the array is solely for unindifference or misconduct on the part of the sheriff. The judgment that I have formed, and in which my brother COLERIDGE states very clearly his agreement, upon the present state of the law, is this: that that which was the single duty of the sheriff in former times, — to collect the names, to determine who were fit to be the jury, and afterwards to enter them on the panel, — that all those duties, which belonged to the sheriff alone, by the late Act of Parliament are divided in Ireland between the tax collectors, in the first place; the quarter sessions, that is, on the present occasion, the recorder of Dublin, in the second place; and the sheriff, in the third place. The tax collectors * perform a duty which is merely minis-

terial; the recorder, in the first instance, performs the judicial duty of deciding upon the admission of claims, and upon objections; and then his duty is to sign and settle, and transmit to the sheriff, the list which is to be the jurors' book for the following year. The ground of challenge to this array was, that after the recorder had exercised his judicial functions, after he had determined, "This shall be the list for the county of the city of Dublin for the ensuing year," somebody else had said, "This shall not be the list; that is the list, and that shall be taken, and that shall become the jurors' book." The handing over the perfect list by the recorder to the sheriff is a ministerial act, but that ministerial act has been imperfectly, or rather not at all, performed. The challengers say, "You have deprived your own judicial act, which has been properly performed, of the weight of authority to which it was entitled; you yourself have handed over a list which has made the book imperfect, and therefore we contend that that is no book."

My Lords, I cannot help believing that if that view of the case, which my brother COLERIDGE states far more forcibly than I can do, had been presented to the learned Judges at their consultation, they would have thought it an argument at least worthy of consideration. I think they would not have held it sufficient to say in answer, "We find in Lord COKE that it is only in respect of a default by the sheriff that a challenge can be made." The sheriff was then the only officer entrusted with the return of juries, except the bailiff of a franchise, who is an officer strictly analogous. My noble and learned friend I think stated it truly when he said, "The objection is to the conduct of the returning officer."

The same *language occurs in Viner's Abridgment, * 358 title Trial. Then who is the returning officer? Why the recorder is the returning officer for this purpose; and, in my opinion, the recorder, though without the slightest imputation upon his motives, which is disclaimed by all, was guilty of a default, when he handed over to the sheriff, as the list to make the jurors' book, that which is not the list required by law; and with respect to which, the recorder himself had declared that that shall not be the list, but that another shall.

He indeed is free from all suspicion, but he has power to indulge the grossest partiality; and if he were justly suspected of it, the general argument would leave the defendant without any protection against its effect.

My Lords, I have written a great deal more than I should be desirous of troubling your Lordships with; but I have stated my dissent from my learned brother the Chief Justice of the Common Pleas, upon the principle upon which the challenge to the array is allowed; thinking the true principle of the challenge to be, the security of the parties that a jury shall be fairly taken. The punishment of the sheriff for any default is wholly immaterial to the parties, who have no other interest than that security, though the law enabled the Court to visit the misconduct of its officers with just displeasure. I also differ from him and from my noble and learned friends who have addressed you this morning, in what they have stated as to the consequences which are likely to ensue. The learned Lord Chief Justice says, "No object or advantage could have been gained if the challenge had been allowed; for if the challenge had been allowed, the jury process would have been directed to some other officer." Now there

* 359 I venture to think that there is * a mistake. The default is not that of the sheriff, and therefore the duty of making the return would not have been taken from the sheriff. The default is either in the recorder, or in the clerk of the peace who acts for the recorder, and who sends to the sheriff an incorrect list. There would, therefore, be no reason whatever for depriving the sheriff of his right to return a second jury, if the first were set aside on this objection. A *venire facias de novo* might now issue, if this were the only objection; and at this very moment the book may be found perfect, notwithstanding the mutilation that it underwent in the mean time; or circumstances may arise to deprive these defendants of the right of challenge. What may occur in the course of pleading, upon any future challenge to the array, I know not, and have no right to conjecture.

The Act of Parliament expressly provides for the want of the jurors' book being returned. My noble and learned friend on the woolsack meets that by saying, "Here is a

book returned ;” but what is the book returned ? The Act of Parliament requires that a book shall be returned which is correctly made up from the list ; but the book which has been returned is a book incorrectly made up from the list. It is said on the one hand, “ What ! if there is a single defect, is that to vitiate the whole ? ” And there I think the learned Lord Chief Justice has fallen into a mistake, which probably would have been corrected if this opinion, proceeding from so humble an individual as myself, had been thought worthy of discussion at their meeting and of a more specific answer here. He says, “ If in England, through accident, carelessness, or design, a single name had been omitted in the list delivered to the clerk of the
 * peace, according to the argument the whole book * 360
 would have been vitiated.” I beg leave to question that altogether, because all that is done previously to the decision of the Quarter Sessions is referred to that decision ; that decision is in itself judicial, and makes the book from which I say that the parties had a right to have their jury selected.

When this argument, to which great force was given in Ireland, was stated at the bar in this House, the *reductio ad absurdum* was encountered by an opposite one of much greater extent ; for the argument was, “ If I am unreasonable, and if the consequence is very inconvenient of saying that the omission of a single name shall vitiate the whole book, and make it a different book, what is the effect of omitting sixty names ? — what is the effect of omitting 600 names ? — because either of these modes of proceeding is equally beyond the reach of question, unless this mode of questioning it is to prevail.” My Lords, I admit the inconvenience may be very great upon a single occasion, that parties shall not be tried out of any book that the sheriff has received. But let me here observe also by the way, that the decision in the case of *The Queen v. O'Connell* is no decision upon any other case. If the other parties who have issues to be tried are satisfied with the jury-book as they find it, we may be sure that they will not challenge ; but if they do, and if a true jury-book has not been returned for that year, the law itself provides

that the former jury-book shall be resorted to. And this is the law of England as well as the law of Ireland, which follows it as closely as the different circumstances of the two countries will permit. My Lords, my learned brother the Lord Chief Justice supposes that the omission of one name from the unrevised lists would, on my argument,

* 361 *destroy the array. With great submission I think

I have shown the contrary, and that probably no inconvenience would arise from holding it to be vitiated by the fraudulent abstraction of many names after the lists have been adjudged upon and signed. I humbly ask, what balance is there between the two sets of inconvenient consequences? Is it not right to hold the public officer to the strict and faithful discharge of his easy duty? Can any thing be more wrong than that he should enjoy full license to tamper with these sacred documents according to his pleasure?

Now, my Lords, what follows appears to me to be of the very highest importance. That there may be the greatest wrong and injury committed by this very omission of names from the list, is universally acknowledged. And the Chief Justice says, "that there must be some mode of relief for an injury occasioned by such non-observance of the directions of an Act of Parliament is undeniable." So all the Judges in Ireland still more emphatically assert. So says my noble and learned friend on the woolsack. So says my noble and learned friend who has just addressed your Lordships. What, then, is the mode of relief?

My noble and learned friend on the woolsack did certainly raise my expectations to a very high pitch upon this subject. In one part of his argument he said, "The party is not without a remedy; the party can set himself right. There may have been a great error, a great injury; but there is a correction for that error, a redress for that injury; there is a way to prevent the injustice of such a trial as the law never contemplated, and would not have endured." Then I wanted to

hear from that high authority, what is that remedy? —

* 362 what is that redress? — and what is *that mode of

preventing one of her Majesty's subjects from being tried by such a jury as the law never provided for him?

“ Oh,” says my noble and learned friend, “ you must excuse me there. I shall put off telling you what the remedy is till some future occasion ;” as if any occasion could more pressingly require the statement.

When my Lord Chief Justice and the other learned Judges in England, and the learned Judges in Ireland, and my Lord Chancellor, can inform us of no remedy whatever against this, which is admitted to be possibly the greatest wrong, and productive of the greatest confusion and interference which it is possible to contemplate with the sanctity of the law and the security of the subject, I shall venture to go further and declare that, if this right of challenge is gone, the law provides no remedy ; but I will not believe that the law can have placed its subjects in such a situation. Unless I see the old and well-known constitutional practice of challenge to the array, founded on the principle of the array being itself incorrect and injurious to the party, — unless I see that ancient process directly repealed by Act of Parliament, I will not believe that that process does not still exist, and that that remedy is not still preserved to the subject. The absence of all other remedy in a case of such immense importance, is to me demonstrative proof that that old remedy exists ; that the objection has been well taken ; that the challenge ought to have been allowed, and that the trial has erroneously proceeded.

My Lords, I shall keep my promise, and spare your Lordships the hearing of much which I have collected. But there is one thing too remarkable to be overlooked. In that short passage in Lord COKE, * which contains the * 363 whole of the learning upon this subject (Co. Litt. 156), he cites a case from the Year Books, which is twice reported, once in the 17th of Edw. 3, and once, I believe, in the 20th of Edw. 3, though I think *Mr. Hill* quoted it as the 50th. I could not find it there, but I found it in the 20th, and I have it copied before me. The sheriff returned a list, which the bailiff of the franchise ought to have returned ; that was held to be wrong *primâ facie*, because it deprived the party of his challenge against the bailiff individually. But then it was argued, “ Oh, but there are good names enough

returned by the sheriff to ensure the party a fair trial ;” exactly the argument which appears to have succeeded in Dublin. But the Court held, in the time of Edw. 3, that as the array was one entire indivisible thing, one error would vitiate the whole, and the whole was accordingly set aside. In that very case the sheriff was charged with unindifferency; the question of his unindifferency was tried, he was acquitted upon that charge; and yet the fact of his having done, though not with any corrupt or partial intention, that which gave a different jury, was deemed a default sufficient to set aside the whole proceeding.

My Lords, I must not leave this subject without observing yet further upon the want of other remedy. It was suggested in the course of the argument here, by some learned person, I think, that an application might be made to the Court. What! are the Queen’s subjects to apply to the discretion of the Court to have a lawful jury to try them for their lives, for their liberties, for their most important interests? Is it to be a thing upon motion, and upon affidavit, and upon written deposition, the party accused always
 * 364 * swearing last; and, after all, the matter referred to the discretion of the Court, the decision subject to no appeal? But in this case I find the Judges stating that there was such a motion. The motion was refused. Upon what ground I do not know, for I have read nothing of these proceedings but what I have seen in the papers printed for our use. But as I understand the facts, I must take the liberty of saying, that it would startle any Court in England to hear that such a motion as that should be refused; because I understand the whole list of jurors for the county of the city of Dublin consists of 717; it is so mentioned by Mr. Justice BURTON, in his judgment. Now the special jury-list out of that will be a very small and inconsiderable proportion of it; and the omission of fifty-nine names out of such a proportion of the sheriff’s jury-list as remained for special juries, is enough to affect any panel. I am not sure whether I am stating correctly the number of the whole book or not. If not, I shall be glad if any learned gentleman can correct me; but I gather also, from the case of *The King v. Fitz-*

patrick, that 725 was the number of the whole list of jurors.

The Attorney-General for Ireland. — As your Lordship has appealed to me, I would say that the special jury-list contained the names of 700 and odd.

LORD DENMAN. — I am much obliged for the correction, and indeed thought it very likely that the number must have been greater than it would appear in both those passages; but still I cannot help thinking that the omission of fifty-nine names is considerable enough * to affect any * 365 party's chance of obtaining a right jury. The number seems to me to be a great proportion. It is obviously by no means impossible that, if those fifty-nine names had appeared in the panel, the whole jury might have been drawn from those names; and who can tell me that the effect of the evidence upon the minds of the jury might not have been entirely different, if they had consisted of those gentlemen? That, however, is a subject upon which I think I am not at liberty to enter. I consider that it cannot be incumbent upon any person to prove any other particular injury, than simply and solely that one of her Majesty's subjects, put upon his trial, has not had the security which is provided for him by law, that that trial shall be a fair one.

If this be otherwise, — if the old redress is abrogated and no new provided, — that improved law, which was intended to place the construction of juries beyond all abuse and all suspicion, would have the effect of securing success to the worst manœuvres, and of unsettling the public confidence in the most important functions of justice.

My Lords, I now proceed to the other question, which I certainly approach with all that diffidence so properly expressed by those learned persons who differ from the very weighty opinions which have been given by the majority of the learned Judges to your Lordships. In the first place, it is my bounden duty to state that I do not entirely agree with the learned Judges in thinking that there are only two objectionable counts; it appears to me that there are other counts

open to very serious objection, and I should be sorry to preclude myself by any thing which I may now say from
 * 366 giving a judicial opinion against counts * so generally stated, and charging as an unlawful act a conspiracy to excite dissatisfaction with the existing tribunals, for the purpose of procuring a better system. I am by no means clear that it may not be an innocent and a most meritorious act; I am by no means clear that there is any thing illegal involved in exciting disapprobation of the Courts of Law, for the purpose of having other Courts substituted more cheap, efficient, and satisfactory. But it is quite enough for me, for the purpose of the present argument, as the learned Judges have given their unanimous opinion that there are two bad counts, to declare my agreement in that opinion, and for the reasons assigned. Now, the question is whether the judgment which has been pronounced, and the sentence which has been passed, can be good, under such circumstances.

The question, as put by your Lordships to the Judges, is this :

[His Lordship read the 11th question. See *ante*, p. 232.]

The Court has pronounced its sentence upon the defendant in respect of counts A, B, and C,—in respect, that is, to “his said offences.” But it is said that the sense of these words, according to the approved rules of construction, is, that they mean only such offences as shall appear after legal argument to be well laid. I cannot think so. It appears to me to be an extremely ingenious turn of language to say that you can so confine it. Here are three counts, each laying what is presumed to be an offence; on each the grand jury has made presentment of a true bill. To each of those three counts the plea “Not guilty” applies; upon each issue a trial takes place; upon each there must be evidence given; upon each of those three counts the verdict is taken. The
 * 367 * Court proceeds to say, “For his said offences—the offences of which he stands convicted—I sentence him to a certain discretionary punishment,—to a punishment which I inflict according to my discretion, and according to

my view of his demerits, as found guilty of those his said offences."

We are told that it is necessary to "presume" (my noble and learned friend on the woolsack repeatedly used the word "assume") "that the Court pronounced their judgment on the good counts only." In the first place, I feel an unconquerable repugnance to that; because I cannot be ignorant that I should be setting up a presumption in direct contradiction to the notorious fact. If your Lordships are to teach the present and future students of the law what the law is upon this subject from your proceedings in this case, and you say, "we must by law presume that the Court in Ireland passed this sentence upon the good counts only," — at least those members of the legal profession who go to practice on the other side of the Channel will take in the Reports of the Court of Queen's Bench in Dublin, and there they will find a solemn decision directly contrary to what your Lordships will have thought proper to assume; because there, on motion in arrest of judgment upon the ground that these two very counts were bad, the Court said, "These counts are perfectly good; they are unexceptionable." Strange now to call upon your Lordships to assume that those counts were not acted upon by that very Court which tells you that they are so good that they are determined to act upon them.

But, my Lords, not only is it against the notorious fact, and, in my opinion, against the plain meaning of the words, but it is against the common probability * of * 368 every case. And here I must take the liberty of advert^g a little to my own experience, which is not very short, in Criminal Courts upon this subject. I know what course I should have taken if I had been pressed to give judgment at the moment, and had then given it. If nothing had taken place respecting the validity of the indictment or any part of it, — and much more if such validity had been disputed, but established, — according to my view, I should have deemed it my indispensable duty to apportion the sentence to the degree of criminality that was stated in all the counts that were proved by the evidence.

My Lords, I quite agree with Mr. Baron PARKE as to the

general opinion which has prevailed in the profession upon this point. He and Mr. Justice COLTMAN have both stated the existence of that opinion as a fact upon which no doubt can be entertained. I felt, as my learned brothers did, great surprise when I heard that most able and ingenious argument which was addressed to the House, and I confess that I had never felt a doubt upon the subject until that argument was submitted to my mind. But I must add that I never had occasion to give a judicial or a professional consideration to the matter. And I must ask, when such an argument is raised, what is the duty of a Court of Error? To consider whether the doubt is well founded or not. Not to be run away with by mere authority, unless indeed it is so decisive as to get rid of the doubt; but to see whether in point of law there is legal ground for the doubt which is entertained. My Lords, this is no unusual practice. This is not the first

time that a Court of Error has taken that view. I

* 369 perfectly well remember, not indeed in a * Court of Error, but at the time when my noble and learned friend on the woolsack was presiding with so much dignity, and so beneficially to the public, in the Court of Exchequer, a case was brought before that Court, upon which it was proposed to overrule, not the *dicta*, the impressions, the fancies of the learned frequenters of Westminster Hall, but decided cases, running through a period of near fifty years, appearing in numerous reports, and laid down by all the text-writers. I believe Mr. Justice BAYLEY, on a particular examination of those cases, thought them clearly founded in error; they were traced to a *dictum* uttered by Lord MANSFIELD in his first judicial year, which *dictum* was held by Mr. Justice BAYLEY to be untenable; and my noble and learned friend pronounced the unanimous judgment of his Court, denying the authority of these cases, and overruling them all. I speak of the case of *Hutton v. Balme*. (a) The same question, in another case, came afterwards upon a writ of error before your Lordships' House; (b) and your Lordships thought

(a) 2 You. & J. 101; 2 Cr. & J. 19; 2 Tyrr. 17; and on Error, 1 Cr. & M. 262; 2 Tyrr. 620; 8 Moo. & S. 1; 9 Bing. 471.

(b) See *Garland v. Carlisle*, *ante*, Vol. IV., p. 693.

that you were bound by the authorities, although the principle might not be perfectly clear. But that did not prevent my noble and learned friend and the Court of Exchequer from entering into a full consideration of the question, whether in point of principle those cases were good law, or whether they ought not to be rejected if proved to be founded on mistake ; nor did any one impugn their right and their duty to examine in that way any legal proposition.

I heard my noble and learned friend (Lord BROUGHAM) with the admiration I always do, when he laid down the rule on this subject. He reminded * your Lordships * 370 that you are not bound to do more than respect in the highest degree, and consider with the utmost care, the opinions, which may be given to you by the Judges. But you have a duty of your own to perform. Your consciences are to be satisfied ; your minds are to be made up ; your privilege affords you the assistance of the most learned men living ; but your duty forbids you to delegate your office to them.

And, my Lords, what happened in this very House not twelve months ago ? (a) There was an universal opinion at the English bar, founded upon the *dicta* of Judges as illustrious as any who have ever filled the seats of justice in any country, upon a question of no less importance than the nature of marriage ; Lord MANSFIELD, Lord ELLENBOROUGH, Lord KENYON, Lord TENTERDEN, Lord Chief Justice GIBBS, and many others, all clearly taking the same view of the subject, in *dicta* which perhaps did not in any one of them go precisely to the extent of a decision upon the subject, but which showed their opinion upon the nature of the contract, and that those enlightened minds had come upon general principles to a certain conclusion. Nay more, Lord STOWELL, half a century of whose invaluable life had been devoted almost exclusively to the consideration of this subject, had pronounced a decision conformable to that opinion. Your Lordships had the case before you. The Judges of the present day were consulted, and formed an opinion directly contrary to that of their predecessors in former times ; they

(a) See *The Queen v. Millis*, *ante*, Vol. X., p. 534.

did not feel themselves deterred by this great concurrence of authorities from asserting their opinion as to the law. But did my noble and learned friend (Lord BROUGHAM) feel himself fettered by this unanimous opinion of the
 * 371 present luminaries of Westminster * Hall? By a most powerful argument he sought to overthrow their conclusion, and strenuously exhorted your Lordships to dissent from it. Nor did he stand alone: others among us concurred with him in holding the former principles to be just, and the reasoning of all my learned brethren to be insufficient to confute them. Your Lordships have not forgotten the termination of that case. Those of your Lordships who took a part in the discussion were equally divided; the consequence of which was, that the judgment of the Court below stood affirmed, deciding against the *dicta* of those most venerable and distinguished individuals.

Now, my Lords, after that proceeding, which indeed followed many precedents, are we not bound to make a full examination of the grounds and reasons upon which the Judges may have founded the opinion which we asked at their hands? Having done so in this case, I must venture to say that my surprise has changed its object. I no longer wonder that the objection should have been taken to the supposed law, but that such should have been supposed to be the law. I am convinced that it never has been the law; and I think a slight attention to the cases will show that that is the true conclusion at which to arrive.

My Lords, this whole doctrine has arisen upon a single remark of Lord MANSFIELD, twice repeated. It was made on occasions where it was perfectly immaterial to know what his Lordship might think about criminal law, and where it is clear that his Lordship unnecessarily went out of his way to heighten a grievance which he thought he found in the practice in civil actions, as contrasted with that in criminal proceedings. He says, "In cases of civil actions, where there is one good count and one bad, and the verdict is general
 * 372 and for damages, in that case the * Court above will be bound to set aside that verdict, because the damages proceed upon all the counts, and you cannot tell how much

may have been given for the good count ; ” and this undoubtedly is both true, and, in the supposed circumstances, inevitable. But I most deeply regret that it did not occur to Lord MANSFIELD that, presiding at Nisi Prius, he had a plain remedy for that evil in his own hands ; because he had nothing to do but to tell the jury to assess the damages separately upon the several counts, and then the damages would have stood for what they were worth, — well awarded upon those counts which were good, and liable to be set aside upon those counts which were bad. Why, upon that occasion, that noble and learned Judge should have thought it necessary to say one word respecting the rule in criminal cases, I am quite at a loss to conceive.

He does, however, say that ; and there cannot be a doubt that, in one sense, the assertion is correct. For if an ingenious counsel should, after a verdict finding the party guilty on all the counts of the indictment, object to one of them that it was bad in law, he would be told that one such objection was immaterial, since there were other counts, on which, if good, the Court might proceed to pass sentence. It is clear that this opinion, taken up in general terms, has engendered the notion which has been universally prevalent in Westminster Hall. Several Judges, and many barristers and persons in high situations, have expressed the same opinion in the same general terms, and they have taken for granted that it might be truly so stated. And I am tempted to take this opportunity of observing, that a large portion of that legal opinion which has passed current for law, falls within the description of “ law taken for granted.” If a statistical table of legal propositions should be drawn out, * and * 373 the first column headed “ Law by Statute,” and the second “ Law by Decision ; ” a third column, under the heading of “ Law taken for granted,” would comprise as much matter as both the others combined. But when, in pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and restatement of a doctrine — the mere repetition of the *cantilena* of lawyers — cannot make it law, unless it can be traced to some competent au-

thority, and if it be irreconcilable to some clear legal principle. Now in this case, from Lord MANSFIELD's uncalled-for remark, that a good judgment can be pronounced on an indictment which contains some counts so bad that on them the judgment might be arrested, it has, I think, been rashly and groundlessly taken for granted, that a general judgment pronounced upon an indictment consisting of bad as well as good counts, where a verdict has been taken for the Crown upon all, cannot be reversed upon writ of error.

I have before ventured, my Lords, to speak of my own experience, and I must here do so again. I think that some of my learned brethren, who stated their views on a former day have really forgotten some matters of ordinary practice, or their practice must differ wholly from mine. One of their statements is, "that when there is an indictment containing several counts for felony, you take the verdict of guilty as a matter of course upon all the counts, and if there is any one count good, that will support the judgment." I am compelled to deny that this is the universal practice; because I know that whenever I have had to try a criminal upon various counts in one indictment, I have always thought it my duty distinctly to put it to the jury, "Do you agree that

there is any proof upon this point? because, if not,
 * 374 we shall discard * it." For instance, upon a count charging an intent to murder, I should say, perhaps, "You cannot believe that he intended to murder; and therefore, if you agree with me, you will relieve the prisoner from that part of the charge." So of the counts charging an intent to disable and an intent to maim. "No such intent," I might say, "appears to have existed; but as to the intent to do grievous bodily harm, you will consider whether you think that it is or is not proved." If the facts required it, I should take care to desire the jury to say "Not guilty" upon the first three counts, and "Guilty" upon the last count alone. And again, if any of the counts appeared to be bad, I should take the verdict on the good counts only. The prosecutor might enter a *nolle prosequi* on the bad ones, or offer no evidence, and consent to a verdict of acquittal upon them; or possibly they might be quashed by the Court for insufficiency.

I say that any one of these is a proper course, and that it removes all difficulty. What harm is then done? Why is the verdict to be taken upon all the counts, good and bad? Your Lordships heard it stated the other day, that unless that practice is allowed you will impose upon the Judge the inconvenience of being compelled to form an opinion on the validity of the counts, before he proceeds to pass judgment. I see no inconvenience in that. I think he ought to take care that the count is good before he allows a verdict to be taken, or at least before he allows judgment to be entered up on it. So far from thinking that any evil will arise from that practice, I think very great good will arise from it. And I must take the liberty of throwing in the observation, that in my opinion there cannot be a much greater grievance or oppression than these endless, voluminous, unintelligible, and unwieldy indictments. An indictment which fills fifty-seven closely printed *folio pages is an abuse * 375 to be put down, not a practice deserving encouragement. Most of the persons who are accused of offences are in a line of life which does not enable them even to get a copy of such a charge from the clerk of assize, who will not part with it without his fees; and when the party accused has obtained a copy, the greatest stretch of mind of the most learned persons can hardly, even for days, as we know from the arguments at your Lordships' bar, find out what it is that is really the matter of criminal charge. It is often ambiguous to that degree, that possibly the pleader who drew the indictment may mean one thing, the Judge another, the jury a third; and the jury, if asked whether the party was guilty in the only sense in which the law would condemn him, might in that sense have acquitted. A fourth sense may, perhaps, be discovered by the Court of Error, for these ambiguous phrases; unless, indeed, there should be a single good count among numerous bad ones, and then the Court of Error would be invited to say, "Do not trouble yourselves to inquire whether those charges are good; throw them over altogether; presume that the sentence was awarded in respect of the single good count, and that alone."

I am deliberately of opinion, that the practice of selecting

at the time of trial the counts on which judgment may be lawfully awarded, is the right and wholesome practice, producing no inconvenience, and affording a great security for justice. In old times, when the indictment consisted of a single count, it was of necessity the universal practice to form an opinion whether that count was valid; the constant aim of modern legislation has been to simplify criminal charges, nor is any object worthier of attention in framing the code of every civilized country.

* 376 * I think, also, there has been another mistake made as to the practice of the Court of Queen's Bench in this country. It is said, that when an objection is taken, and a motion made to arrest judgment upon a particular count, the Judges are in the habit of saying, "No; we shall not hear any argument upon that particular count, because there is another count upon which the judgment may be supported." Nothing is more reasonable, if some counts are admitted to be good. But was that the case last year, in the indictment against Feargus O'Connor? (a) There were two counts only upon which he and others were found guilty; upon one of them, namely, the fifth, we first of all proceeded to hear an argument whether or not the judgment should be arrested. If the judgment had not been arrested, we should have proceeded to pass judgment upon that count. We thought, however, that the judgment ought to be arrested upon that count; and thereupon it became necessary, in the second place, to examine another count of doubtful validity, upon which the jury had also found the prisoners guilty. That count was framed in a style of excessive verbosity and ambiguity of expression, upon which no clear ideas could well be formed. The then Attorney-General, my right honourable friend the present Lord Chief Baron, discovered that there existed very great doubt in the minds of the Judges whether that other count was a good one, and accordingly he has never pressed for judgment upon it. But the course then taken was to attempt to arrest the judgment, and

(a) In Trinity Term, 1843; not reported. The judgment was arrested on the insufficiency of the allegation of venue. See 13 Law Jour. M. C. p. 33.

the argument for arresting the judgment was permitted upon those particular * counts which were successively * 377 attacked as bad counts. It is not correct, therefore, to say that the Court would never enter into that consideration.

The subject may be illustrated by a case particularly in my mind, which occurred lately before me at Guildhall. (a) There was a doubt made whether a charge of conspiracy in one of the counts was not altogether good for nothing, as stating facts which had taken place in a foreign country. My observation upon that was, "I shall not pass judgment here, though a verdict of guilty should be returned, and therefore it is immaterial what I may think about the goodness of that count;" but if I had been obliged to pass judgment there, then the judgment would have been upon both counts, and the party must have taken his chance of what the Court of Error might afterwards have thought upon the goodness of the count. But it seems to me that, as in the case of damages, I have suggested a short and simple mode of keeping clear of all difficulty, which I am sure no lawyer will contest with me. So, with regard to several counts in criminal cases, the objection may be entirely avoided by the Court passing a separate judgment upon each count, and saying, "We adjudge that upon this count on which the prisoner is found guilty, he ought to suffer so much; that upon the second count he ought, on being found guilty, to receive such a punishment; whether the count turn out to be good or not, we shall now pronounce no opinion." And that question would be reserved for the superior Court. A Court of Error would then reverse the judgment only on such counts as could not be supported in law, leaving that to stand which had proceeded upon the charges which were valid.

* Now, both my noble and learned friends have * 378 stated that this is a mere technical objection, and that no injustice can arise from the existing practice. I must say that I think the greatest injustice may arise from it. It

(a) *Qu.* The case of *The Queen v. Lord Ashburton*, tried before Lord DENMAN, at Guildhall, on the 1st and 2d July, 1844.

is very different from irrelevant stuff being foisted into a good count. That is highly improper, if it is done by way of prejudice, because a criminal charge ought to be distinct, clear, and intelligible in itself, and free from all matter of imputation that does not belong to the offence. But still the Court would easily throw aside that irrelevant abuse, and pass judgment only for that which goes to make up the offence. Suppose there had been three indictments, and the prisoner had been found guilty upon all three, and the Court had been permitted by the practice to pronounce one judgment upon all in one sentence, I do not see how it would be at all different from what has taken place here. The subject is so far from being merely technical, that it may involve the greatest injustice; because you may inflict the heaviest punishment for the lightest offence, or, indeed, for that which may turn out to be no subject for punishment at all.

My noble and learned friends have referred to some authorities which it would not be right for me to pass over altogether. They, of course, selected those which they thought the strongest, and to those I shall direct my attention. The first, I think, which was mentioned was the case of *The King v. Powell*, (a) in which there was a general verdict of guilty, for two offences stated in two different counts, one of them charging an assault with a particular intent, and the other a common assault. The sentence was general, and was

* 379 such as only the verdict * upon the first count warranted, and a writ of error was brought. Now, there is one very remarkable circumstance in that case, which appears in the judgment of Mr. Justice TAUNTON. He says: "When I look at this indictment, I do not find that it states two offences; it does not say that he committed another assault, which is the usual course of doing it; but, in fact, it is only another description of the same assault, and therefore there is nothing at all wrong in saying that the heavier punishment which the first count enabled the Court to award is properly assigned." But the only objection taken there was simply this, that the words "misdemeanour and offence"

(a) 2 B. & Ad. 75.

applied to one of the counts alone: the Court held that it applied to both; that "misdemeanour" ought not to be confined to the offence described in one count, but is *nomen collectivum*, including the offence with its aggravations, as stated in the first count, as well as the mere assault, as stated in the second. That is the decision which the Court came to upon that occasion: and to apply that here, as laying down the principle that we must secure the right of the prosecutor to convict generally, and have a general sentence passed, unquestionable in error, though it should turn out afterwards that there was some bad count in the indictment, stating a different misdemeanour, is what I cannot at all understand.

The second case quoted was *The Queen v. Rhodes*, (a) which occurred in the time of Lord Chief Justice HOLT. That was an indictment for subornation of perjury; there were several assignments of perjury. The defendant was convicted of the offence. "But then," said the counsel for the defendant, "some of those assignments of perjury are bad, and therefore the judgment is bad, because general." That was in arrest of judgment * also. But I * 380 should have answered him, as I think Lord HOLT did answer him upon that occasion, — for that is the meaning I ascribe to what he says, and I know it is a course which we have taken very recently: "The question is a question of perjury; it does not signify how many assignments there are; there may be twenty which are bad, and only one which is good; but you still convict him of subornation of perjury. It is no separate finding. It is not for 'his said several offences,' but for his one single offence of subornation of perjury; and whether the overt acts are more or fewer, or only a parcel of unmeaning words have been added, is perfectly indifferent as to making it a good judgment upon the only crime charged in the indictment." I think that this is an answer which entirely explains that case, and shows it to be of no application in the present instance.

Then my noble and learned friend referred to the case of *The Queen v. Ingram and Wife*, (b) and what do your Lord-

(a) Lord Raym. 886.

(b) 1 Salk. 384.

ships think that case was? It was a charge against a man and his wife, that they were guilty of an assault. There was a motion in arrest of judgment. The objection was something of a grammatical nature. In the first part of the indictment the singular number was used, *insultum fecit* (all the indictments at that time were in Latin); upon which the grammarians who defended the parties said: "This is a bad record, because the *insultum fecit* (that is, made an assault) only applies to some one of those two, and we do not know which." But however bad the grammar, or however doubtful the charge, the following words were correct and perfectly clear, and touched both defendants. The same count, there

* 381 being only one, proceeded to say, "*vulneraverunt * et verberaverunt.*" A little bit of false grammar, which comes in before, is of no consequence at all, with reference to the punishment of those who have been convicted of the offence well and grammatically laid. Chief Justice PARKER said upon that occasion: "If any part of the count is good, the whole is good," and so it is; yet that case is quoted to prove a judgment good which rests on two counts, one good and one bad. And those two are the only cases before the time of Lord MANSFIELD, which are now quoted as establishing his position, stated by him in a civil action, not distinctly upon the point in question, but antithetically, as serving to illustrate the supposed absurdity of the rule in civil cases. I admit that cases come afterwards which require some explanation; but the first explanation is to be found in the general language which was employed by so great an authority upon this subject, and a want of examination of what the principle really was. My learned brother, Mr. Baron PARKE, was exposed to some censure for expressing more doubt than seems to be quite consistent with his holding a strong opinion on this point: perhaps he may have done so; still that opinion is quite plainly to be discovered. Even if we could believe it possible that he was not convinced by his own lucid exposition, it cannot fail, I think, to convince any one who brings an unbiassed mind to the question.

Then, my Lords, we come to the case of *The King v.*

Hill, (a) and which, in my opinion, has really no application whatever to this subject. The party was there found guilty of an offence at the assizes, the same offence being stated in six or seven different counts. The question was, whether all those counts were not bad; and Mr. Justice CHAMBRE, * the learned Judge who tried the case, when the pris- * 382 oner was convicted, passed a sentence upon all the counts which a conviction upon any one of the counts would have warranted; but he said, "I will reserve this point for you." The mode of proceeding there was a matter of arrangement between the counsel and the Judge at the trial. What was the arrangement? Why, that if all the counts were bad, the prisoner should be pardoned; but if any one count was good, the prisoner was to undergo his sentence, for any one was sufficient to warrant the punishment. From that it is inferred, that had a writ of error been brought upon a judgment upon all those counts, the judgment would have stood, notwithstanding five or six were bad. I do not know how the judgment was entered; but I know the reservation was, "He is convicted upon condition that I find one good count. On condition that all the counts are not bad, the conviction stands, and there is an end of it." I have no reason to doubt that the judgment was properly entered. I am quite sure, if I had tried the case, it would have been so; because it is my constant practice, and I believe that of several other Judges, to take care that, with their knowledge, no judgment shall ever be entered for the Crown upon a bad count.

In *The King v. Mason*, the judgment was arrested because all the counts were bad. That case requires no other comment. In *Young v. The King*, (b) however, a difficulty, I admit, arises, because there the punishment was discretionary. The Court might have pilloried, or imprisoned, or transported. The Judges there thought proper to transport; and I agree with the observation which has been just made, that though if they were to transport, — it could only be for the term of seven years, — they must have exercised a discretion * in electing that mode of punishment, * 383

(a) 1 Russ. & Ry. C. C. 190..

(b) 3 T. R. 98.

and that therefore they did pass sentence upon an indictment which appears to have been wrong as respects two of the counts, — a sentence which was affirmed on a writ of error. According to my argument, I agree that that judgment was wrong. I agree also, that to the answer “the objection was not taken,” it is a strong reply, that that learned Court and the eminent counsel employed would have been very likely to take it if well founded. But I must apply my brother PARKE’s observation, that it is perfectly clear that upon that indictment (as in *Rex v. Powell*) the several counts were only several descriptions of one set of facts; and though that may not be properly discoverable from the record, still, in point of substance and effect, proof of those facts warranted the sentence.

So where a felony was established, requiring capital punishment or transportation for life, the number of counts could make no difference, because the punishment pronounced upon any one of them exhausted the whole materials of punishment, and admitted of no addition. The effect is a judgment for one felony stated in various forms, not for a variety of misdemeanours described as “his said offences.”

The case of *Young v. The King*, or rather the course which was not resorted to in that case, constitutes really the whole strength of authority relied on by the Crown in this argument. It is said, “This point, if available, should have been taken, but was not taken.” I can only explain it by the current notion that one count alone would support any sentence applicable to the offences stated in the whole indictment; and can only account for that notion by Lord MANSFIELD’s general words, needlessly and inconsiderately
 * 384 * uttered, hastily adopted, and applied to a stage of the proceedings in which they are not correct in point of law.

My noble and learned friend on the woolsack denied all distinction between the proceeding by arrest of judgment and that by writ of error, for the purpose of the present debate. And it is curious that the learned reporter, in his marginal note to this case of *Young v. The King*, says that the Judges refused to arrest the judgment, though in fact they refused to

reverse it on writ of error. The identity of the two proceedings is assumed, — an assumption which shows the hasty manner in which opinions are occasionally taken up. The difference is, however, palpable. In the former case the Court abstains from pronouncing judgment upon any count that may be deemed erroneous; the judgment may, however, be properly entered up on such counts as are good: in the latter, the judgment, having already been finally entered up, cannot stand if it rest on any materials which are vicious in point of law. “But what absurdity,” says my noble and learned friend (Lord BROUGHAM), “to suppose that a Court should refuse to arrest the judgment on a bad count, and yet leave the bad count on the record; so that, when judgment was entered up on that record, the vice of that one count should be left to subvert it altogether!” I should rather suppose that care would be taken to forbear from entering up judgment on the bad portion of the indictment; and if the prosecutor should perversely so enter it up, I cannot doubt that the same reasoning which has convinced myself, and others of more authority, would have induced the Court to decide against it, if the objection had been pointedly propounded.

* It is admitted on all hands that this question is * 385 *res integra*, as far as decisions are concerned. We must then weigh the principle, and I find it wanting: it is inadequate to support the loose and censurable practice which some of the learned Judges have described as prevailing. To pass a sentence for three offences, where a party is well convicted of only two, cannot be right. And let it be observed, that I do not seek to control a discretion exercised on the proper subjects of that discretion: I merely hold it wrong to punish, in a case where no punishment is lawful. The judgment is not severable, and if partially wrong, must, for that reason, be wholly reversed, on the very same unquestionable principle which must be applied to civil cases. The sentence in the one, and the damages in the other, stand on the same footing, the moment it is clear that the judgment is general, and proceeds upon all the counts.

Another objection to this mode of giving judgment has

been adverted to. It is observed that the party will not be able to defend himself in case of a second charge against him, of the facts so imperfectly stated in the bad count. Suppose he pleads, "I have been already punished for this." The answer will be, "No; you have not been already punished for this, because the offence was laid in an imperfect count, and the law presumes that no punishment was inflicted upon you in reference to that bad count." What is the answer given to that argument by one of the most acute, and learned, and candid persons that I have ever had the good fortune to co-operate with in the whole course of my life? — an argument, let me observe, not stated with any doubt

or difficulty by my learned brother Mr. Justice COLT-

* 386 MAN, whose * plain and manly understanding brings it before your Lordships in a way that cannot be misunderstood. He says, "It is injustice if a punishment is to be passed which will not protect the party from future punishment from the same set of facts." Is it not so? Why, what is the answer given by Mr. Justice PARSONS to that argument? He says, "It cannot lie in the mouth of the prosecutor to say that defendant was not convicted on the bad counts of the former indictment; for the former conviction remaining unreversed is a good conviction, be the counts never so bad." My noble and learned friend on the woolsack, quoting this passage from my learned brother, observed, "The Crown would be estopped from denying that he had been so convicted;" — well convicted, it should then seem, of that which is no offence, and punished for that no offence, in spite of the presumption so much descanted on.

It is, however, no easy matter to estop the Crown in any of its legal proceedings. The difficulty is greatest in criminal prosecutions, where any one may employ the name of the Crown in accusing and bringing to trial. And what is to estop the Crown in the case supposed? The fact of the party having been adjudged guilty of this offence. Yet the whole argument has been to show that, as this offence was ill laid in the indictment, you must presume that no such judgment could have been pronounced. I confess, however, that "estoppel" is to me a word without meaning, if this

judgment now under investigation can be maintained by the reasoning adduced in support of it; for how could that doctrine at any time, and under any circumstances, apply more strongly than at the present moment, when the first law officer of the Crown in Ireland is not estopped

* from attacking that indictment, preferred by him- * 387
self, on which, in all its parts, he has obtained a verdict of guilty, and a sentence of fine and imprisonment?

Let me here observe upon what appears to me another striking inconsistency. You are to assume that it is too difficult for the Judge to give his mind to the subject at the moment of trial, and at the same time you are to say that he took care to confine his judgment strictly to those counts that were good in point of law. And this was even urged as the main reason for allowing the judgment to be general; and yet, when that general sentence has been passed, however defective it may be proved as to part of its foundation, the Court of Error must support it on the presumption that the Judge did form that opinion, and discriminate between the good counts and the bad.

My Lords, I state again, that the argument upon this point has overpowered me, not only at the first moment by its novelty, but with its complete demonstrative force, when I now, upon full reflection, come to examine the ground upon which it rests; and I take up, therefore, the principle upon which alone my noble and learned friend has most truly said that we can properly set aside the judgment of the Court below; namely, that nothing short of conviction, amounting to absolute certainty, will justify your Lordships in declaring that what was done below is not properly and duly done.

My Lords, regarding, as I do, the Court of Queen's Bench in Dublin with the greatest respect which it is possible to feel for any Court, being quite aware of the great talents and endowments which adorn the Judges who sit there; and feeling, if possible, a still greater degree of confidence and veneration towards * my learned brethren with * 388
whom I am in the habit of daily acting, whom I regard with warm attachment, and on whose opinions I place

the highest value; differing, with feelings of regret and distrust, from my noble and learned friends who have now preceded me; still, acting here as a Judge for myself, and bound by my duty to exercise my own understanding upon the reasoning which is brought before me, I am fully convinced that the judgment is not good in point of law, and must vote against the motion which has been made by my noble and learned friend.

LORD COTTENHAM.—I quite concur in the observations which have been addressed to your Lordships by my noble and learned friend, as to the difficulty in which any member of this House is placed, who feels himself called upon to advise your Lordships to come to a decision adverse to the opinion of a great majority of the Judges. The opinion expressed by such a majority ought to make any one extremely cautious in coming to a conclusion opposite to what has been so expressed. It ought to make one watch every step that one takes in investigating the subject, and to doubt every conclusion to which the mind may feel disposed to come, in order to be sure, that if you do come to a conclusion adverse to the opinion expressed by the majority of the learned Judges, at least you have exercised all the powers with which you are invested, in order accurately to ascertain whether you have come to a right conclusion. I have adopted that course: I have carefully considered all that has been addressed to your Lordships from the bar, and all the reasoning suggested by the Lord Chief Justice and the

* 389 majority of the Judges in delivering their * opinions.

I have hesitated upon every step of the reasoning which I thought it my duty to follow; and having done so, I have come to the conclusion that the opinion expressed by the majority is wrong, and that the opinion expressed by the minority of the Judges is the right one. Having come to that conclusion, I apprehend there was but one course that was open to me: I apprehend that it was my bounden duty to act upon the opinion I had so formed, and to state to your Lordships the grounds upon which I had formed it.

My Lords, the assistance of the learned Judges is sought

for in order to inform your Lordships, — in order to assist the House in coming to a right conclusion upon the matter ; and undoubtedly their opinions are entitled to the greatest weight ; and no opinion ought to be formed adverse to that which they express, without the greatest care and hesitation. But they are not to bind the House ; they are merely to assist the House ; and no doubt, I apprehend, can be entertained that it is the duty of those members of your Lordships' House, who from professional habits are justified in stating their opinions upon any matters of law that may come under the consideration of this House, after having taken all possible pains to come to a right conclusion, to state their opinions, and to act upon them. Undoubtedly, if there should be any doubt upon the mind of any one upon a subject of this kind, it would be most materially relieved by the case which my noble and learned friend who last addressed the House adverted to, (a) in which my noble and learned friend himself, and my noble and learned friends near me (Lord BROUGHAM and Lord CAMPBELL) thought it their duty (and I think they * had a perfect right to do so) not to dis- * 390 regard the opinions expressed by the unanimous voice of the Judges in that case, but, yielding to them all the weight which properly belonged to them, having been unable to concur in those opinions, to advise the House to adopt a conclusion directly contrary to that at which the learned Judges had arrived. It was my fate upon that occasion to concur in the unanimous opinion of the learned Judges ; but one-half of the learned Lords who expressed their opinions upon that subject were of the contrary opinion ; and it was only by the rule of the House giving effect to the negative where the numbers are equal that the judgment of the House was decided. The only difference between the two cases is this, that the opinions formed and expressed by my noble and learned friends were in that case against the opinions of *all* the Judges ; here, it is an opinion formed and expressed by me, and those noble and learned Lords who agree with me, against an opinion expressed by a *large majority* of the Judges.

(a) The Queen v. Millis, *ante*, Vol. X., p. 534.

Upon one part of this case, to which my noble and learned friend who last addressed the House adverted in the opening of his address, it is not my intention to express any opinion; and I only refer to it now for the purpose of guarding myself against any supposition from my not discussing that part of the case, that I have formed any opinion adverse to the case of the plaintiffs in error. I did not enter into a minute investigation of that part of the case, for this reason only, that having found in that question upon which the Judges are divided sufficient in my opinion to regulate the course which I ought to pursue, I thought it unnecessary to investigate a point upon which the Judges had expressed a unanimous

opinion. I will, however, say this, that if the judgment in this part * of the case be right, it brings forward

this very strange proposition, that there is no remedy for an acknowledged wrong of great magnitude; for you are bound upon that part of the case to look at the facts as they appear upon the challenge, the demurrer, for the purpose of argument, and for that purpose only, admitting the facts as they are there stated. The judgment of the Court is this: that upon the facts as they are there stated, there is no means of doing justice. That a great injustice, according to the statement of facts, has been done, cannot by possibility be matter of dispute. My Lords, if it were necessary to investigate the case, I cannot doubt that we should find that so great a wrong is not without remedy; but I mention this only for the purpose of guarding against the supposition that I have formed any opinion upon that part of the case, contrary to what my noble and learned friend has expressed to the House.

The only part of the case upon which I propose to address to your Lordships any observations in detail, is as to the effect to be given to the opinions of the learned Judges, who were unanimous in thinking that the first, second, third, fourth, sixth, and seventh counts in the indictment are to be rejected; the two last because bad in themselves, and the four others because, the findings being bad, no judgment could properly be passed upon them; but a majority of whom have nevertheless given their opinions, that the jury having

found the defendants guilty upon each of these counts, as well as upon others as to which no objection is made, the judgment and sentence of the Court, expressed to be for "his offences aforesaid," cannot on that account be impeached upon a writ of error.

The rule of law upon which we are called upon to *decide cannot be affected by the consideration of * 392 the nature of the counts we are compelled to reject, and those we find to be good; but it may be useful, in illustration of the importance of the present question, to look to the indictment, and to compare the whole of it with the part which will remain after rejecting the first, second, third, fourth, sixth, and seventh counts.

The question we have to consider is, whether there be error upon the record; and for this purpose, if we read the record as we should any other document, and only give to the words we find there the construction they would receive if read in any other instrument, we find it distinctly stated that the defendants were charged in the indictment with the several offences specified in the several counts, that the jury found verdicts of guilty upon all and each of them, and that each defendant, "for his offences aforesaid," was sentenced to punishment. Did not the Court below pass sentence upon the offences charged in the first, second, third, fourth, sixth, and seventh counts, as well as upon the offences charged in the others? The record of that Court tells us that it did; and if our duty be to see whether there has been any error apparent upon that record, and if we adopt the unanimous opinion of all the Judges that those counts, or the findings upon them, are bad, so that no judgment upon them would be good, how are we to give judgment for the defendant in error, and thereby say that there is no error in the record?

The only answer which has been given to this objection appears to me to be not only unsatisfactory, but wholly inadmissible. It is said we must presume that the Court below gave judgment and passed sentence only with reference to those counts as to which, * or as to the finding * 393 upon which there was no objection. This would be to presume that which the record negatives. The Court be-

low, by its record, tells us that the sentence upon each defendant was for "his offences aforesaid," after enumerating all those which were charged in the indictment. Can we assume that this statement is false, and that the sentence was only upon one-half of those charged? No authorities have been cited for such a presumption: and without referring to the accuracy and strictness required in criminal proceedings, the language of the record, and its natural and obvious meaning, in my opinion, negative it. Before we raise this or any other presumption, it would be well to consider how very probable it is to be contrary to the fact. We cannot look out of the record for the purpose of ascertaining what may have taken place in the proceeding which does not appear upon the record; but it is no improbable supposition that the errors alleged to affect certain counts, and the findings upon them, were brought under the consideration of the Court below upon a motion in arrest of judgment, and that the Court below held the objections not tenable. Yet in such a case we should be presuming that the Court below had, in passing sentence, entirely rejected these several counts, contrary to the fact. We can only look to the record as to what passed in the Court below; and as that informs us that the sentence was passed upon all the offences of which the jury found the parties guilty, we cannot adopt any presumption contrary to what is so stated. It would be a presumption of a fact not capable of being repelled, though contrary to what was known to all to be the truth.

The argument supposes the Court below to have
 * 394 * been right in all particulars; but the impossibility of doing so upon this record was so strongly felt that another argument was resorted to, not very consistent with the first, as it assumes that the Court may have been wrong upon every count but one. It is this: that a Court of error has only to see that there is some one offence properly charged, and a punishment inflicted applicable to such offence; and that being found to be so, it is immaterial that as to all the other counts the Court below was wrong, all such other counts, or the findings upon them, being bad. Now, there are some punishments — such as imprisonment — applied to

so large a range of offences that the restriction of requiring a punishment applicable to the offence will not avail in any material degree to limit the general application of the rule. It makes, indeed, a marked distinction between offences for which the punishment is prescribed by statute and the generality of others, which ought not to be. But consider what this proposition is: all the counts in an indictment for misdemeanour are supposed to apply to different offences. They often do so, and always may. The prosecutor has the option of preferring separate indictments for each, or of joining all in one. If he adopts the former course he must show the indictment right in each, to support the sentence. If he joins all in one, and one sentence is pronounced upon all, he can, according to the proposition contended for, support the sentence, although all the counts are bad but one, which may apply to the most insignificant offence of the whole. A Court of Error has, it is said, in such a case no right to interfere; that is to say, it cannot correct error unless the error be universal, no matter how important the error may be, or how insignificant the part which is right, or what may have been the * effect of such error. The proposition * 395 will no longer be *in nullo est erratum*, but that the error is not universal.

If neither of these arguments prevails, there is manifest error upon the record; and it is not for a Court of Error to enter into any consideration of the effect which such error may have produced. It has no power to alter the sentence, and can form no opinion of the propriety and justice of it from mere inspection of the record, which is all the judicial knowledge it has of the case. Upon what ground is it to be assumed, in any case, that the Court below, if aware of the legal insufficiency of any of the counts, or of the findings upon them, would have awarded the same punishment? In many cases it probably would do so, but in many it as certainly would not. If the several counts were only different modes of stating the same offence, the failure of some could not affect the sentence; but if the different counts stated, as they well might, different misdemeanours, and after a verdict of guilty upon all it was found that some of the counts, that

is, some of the misdemeanours charged, must be withdrawn from the consideration of the Court by reason of defects in the counts or in the findings, it cannot, in many cases, be supposed that the sentence would be the same as if the Court had the duty thrown upon it of punishing all the offences charged. This is well illustrated by a case stated at the bar: Supposing an indictment for two libels in different counts, the first of a slight, the other of an aggravated character, and verdict and judgment upon both, and the count charging the malignant libel, or the finding upon it, held to be bad: Is the defendant to suffer the same punishment as if he had been properly found guilty of the malignant libel?

* 396 * The reason given for the rule that judgment will not be arrested in a criminal case if there be one count good, though others may be bad, assumes that the punishment would be different. In *The King v. Benfield* (a) it is said, "The Court will give judgment for the part which is indictable." If the sentence be of a nature to be applicable only to the count found to be bad, I understand it to be admitted that the judgment must be reversed. In that case it would be clear that the Court has given judgment upon the bad count as well as upon the good one. But what then becomes of the presumption that the Court rejected the bad count? It must be answered, that the presumption in that case is repelled by the record itself: and is it not equally so when the record states that the judgment was upon all the counts, bad as well as good? Is it not just as much alleged in such a case that the sentence was applied to all the offences charged, as, in the case put, that it was applied to the offence to which the particular punishment was applicable?

It being ascertained that this question is entirely new, and that there is no case in which it has been decided, our judgment must be regulated by the reason of the thing, or by analogy to principles adopted in other matters, if any can be found applicable to the case. Two have been referred to: first, on the part of the Crown, that, on motions in arrest of judgment in criminal cases, the motion is always refused if

(a) 2 Burr. 985.

there be any one good count to support the verdict: secondly, on the part of the defendants, that, in civil cases, the rule is directly the reverse, and that, if there be any one bad count, no judgment can be given. Upon considering these two classes of * cases, it appears to me that the * 397 second class is, by analogy, directly applicable to the present, and ought to govern it, and that the first has no application to it, for the reason given; for the rule assumes that, after judgment, the opposite rule ought to prevail. I have already referred to *The King v. Benfield*, in which the Court, after saying that, upon indictments, the Court will give judgment upon that part which is indictable, observes, that "it is not like the case of an action where general damages are given, and one of the counts appears to be bad, in which case the plaintiff in the action cannot indeed have judgment; but the reason why it is so in actions does not hold in indictments or informations;" and after holding that the second song was libellous, the Court said, "that if it had not been so, it would, in an information or indictment, only go towards lessening the punishment, but would not be a sufficient reason for arresting the judgment."

Here we have the reason given why the rule in civil actions does not only apply to motions in criminal cases, in arrest of judgment; because the Court, having the sentence in its own hands, will give judgment upon that part which is indictable, and the failure of part of the charge will go only to lessening the punishment. These reasons have no application to writs of error, on which the Court cannot confine the judgment to those parts which are indictable, or lessen it as the different charges are found to fail. In *The Queen v. Rhodes*, (a) Chief Justice HOLT gives a similar reason. He said, that all the assignments of the perjuries were wrong but one, yet that would be sufficient for the Court to give judgment upon against the defendant. These were both motions in * arrest of judgment. So in *The Queen v. Ingram*, (b) * 398 Chief Justice PARKER said, "In a civil action, where one part of the declaration is ill, and the jury find entire

(a) 2 Ld. Raym. 886.

(b) 1 Salk. 385.

damages, the judgment must be arrested, because the Court cannot apportion them ; but in indictments the Court assesses the fine, and will set it only according to those facts which are well laid."

Much reliance was placed upon the observations of Lord MANSFIELD in *Grant v. Astle* (a) and *Peake v. Oldham*. (b) But it is obvious that he was alluding to motions in arrest of judgment. In the latter case he speaks of there being one count to support the verdict, the rest being bad ; and in the former case he says, " In criminal cases, where there is a general verdict of guilty on an indictment consisting of several counts, if any one of them is good, that is held to be sufficient ; but in civil cases the rule is now settled, and we have gone as far as we can by allowing verdicts in such cases to be amended by the Judge's notes." In both cases Lord MANSFIELD expresses his regret that the rule in civil cases was not the same as in criminal cases, but he does not say in what manner that would be practicable. The rule has always been considered as indispensable. The functions of the Court and of the jury could not be properly maintained if it were the same in civil as it is in criminal cases. Both these were civil actions, so that the observations of the Court as to criminal cases can merely be considered as *dicta*.

Young v. The King (c) was relied upon on behalf of the Crown, as approximating, if not as amounting, to a decision upon the point. I have very carefully * examined that case ; and it appears that the point, if it arose in the case, was not raised at the bar or alluded to by the Court. It is true that it was contended that the two last counts were bad, upon the authority of *The King v. Mason* ; (d) but there is nothing to show that the Court held them to be so ; and there is neither argument nor judgment to show what would be the effect of their being so considered. I have that case now before me ; and though the objection as to the invalidity of the two last counts appears to have been raised by counsel, referring to the case of *The King v. Mason* in sup-

(a) Doug. 750.

(b) Cowp. 276.

(c) 3 T. R. 98.

(d) 2 T. R. 581.

port of the objection, so far was the Court from entering into that part of the case, that Lord KENYON is represented as having said, "In this case the judgment upon all the counts is precisely the same; a misdemeanour is charged in each." It is quite impossible, therefore, that Lord KENYON could have come to the conclusion that the two last counts were bad. He may not have intended to express any opinion upon it; but it seems rather that his mind was directed to the objections made to the earlier counts, and did not advert to the objection made to the two last. It is impossible that he could have said that the judgment on all the counts must be the same, if he had had under his consideration at that moment the fact that the two first counts were bad, according to the previous decision.

The King v. Fuller (a) was a motion in arrest of judgment in a criminal case, and only proves, what is not disputed, that in such cases it is sufficient if there appear to be any one good count upon which judgment may be pronounced; Baron PERRYNS saying, that in the circumstances in which the prisoner stood convicted upon the first count, to which no sufficient * objection had been taken, and upon which, * 400 therefore, judgment must be pronounced, it was not absolutely necessary to pronounce upon the objection. *Angle v. Alexander* (b) only shows the rule in civil cases, and *The King v. Hollingberry* (c) the rule in criminal cases before judgment, about which there is no doubt, and neither of them throws any light upon the present question.

The case which comes nearest to a recognition of the rule contended for by the Crown is *The King v. Hall*, (d) because in that case there had been a conviction and sentence passed upon the circuit, and questions were reserved for the opinion of the Judges, that, if they should find all the counts bad, there might be a pardon. They found all good but one. The Judges who came to this conclusion had nothing to do with the result of the opinion they expressed; but the terms in which the question was reserved implies an impression at the

(a) 1 Bos. & Pul. 180.

(c) 4 B. & C. 329.

VOL. XI.

(b) 7 Bing. 119.

(d) Russ. & Ry. 190.

[337]

time upon the mind of the Judge upon the circuit, that if any count was found to be good, the judgment would not be affected. The case certainly goes no further than this; and it therefore proves only what the learned Judges have informed us, that such an impression has existed generally in the profession, — a circumstance certainly in general not to be disregarded. When, however, it is found that such an impression could not have arisen from decisions, for of them there is none, or from practice, for upon these particular points none seems to have existed, but the origin of it can safely be referred to a course of proceeding at first sight similar to the case under consideration, but found upon examination totally distinct from it, — I mean motions in arrest
 * 401 of judgment, —* I cannot think that any weight ought to be given to such an impression.

It appears from all these authorities, *dicta* as well as decisions, that the reason of the rule in criminal cases upon motions in arrest of judgment, that the motion will not succeed if there be any count good to support the verdict, is, that the Court having ascertained, before it pronounces judgment, what counts are good and what bad, awards the punishment as it may think right upon the offences contained in the good counts, and in such cases it is stated to be usual to enter up the judgment upon those counts only; but that in civil cases, if there be one count bad, and the verdict general, no good judgment can be given, because the Court, having no power over the damages, or means of apportioning some part of them to one count and some to another, is compelled to consider the whole as bad.

It appears to me that a Court of Error is precisely in the same predicament. It has no more jurisdiction over the *quantum* of punishment, and no better means of referring one portion of it to one count, and one portion to others, than the civil Court has, after a general verdict, over damages, in an action. In both cases the preliminary or inferior jurisdiction has proceeded upon an instrument (the indictment or the declaration) found to be in part deficient; and having come to one result upon the whole, which the superior jurisdiction cannot separate or apportion, the same necessity exists in

the one case as in the other, of holding the whole to be void.

It was urged that much inconvenience would arise from adopting this rule. If the rule, though never the subject of decision, be necessary for the due administration * of justice, and be in conformity with established * 402 decisions in analogous cases, there would be no room for such a consideration ; but I not only do not foresee the inconvenience anticipated, but feel satisfied that those which would arise from the opposite rule would far outweigh them, and be productive in many cases of great injustice.

The only inconvenience which could arise from the rule would be, that the prosecutor must be careful as to the counts upon which he means to rely. The evidence at the trial must afford him the means of making the selection, and the defendant has now the means of compelling him to do so. But what are the evils which may arise from rejecting the rule? A defendant, having received sentence for an offence with which he was not legally charged, or as to which there was no legal finding, would not have the means of being relieved from it. There being one good count in the indictment, he would in effect be deprived of the benefit of the writ of error. It is no answer that this is not likely to happen, because generally the different counts are only various modes of charging the same offence. It is certainly not improbable that it should happen, and it is sufficient that it is possible. So long as different misdemeanours may be included in the same indictment, the occurring of this hardship and injustice is obviously possible ; and it is certain, if it should occur, that there would be no remedy for it. Added to this, there is the unanswerable objection, that a defendant might be convicted and punished for a misdemeanour, and again convicted and punished for the very same act, if the count in the first instance was not good, but joined with one that was so ; as in that case he could not get relief against the judgment upon the bad counts in the first * prosecution, or defend himself in the second * 403 by pleading his former conviction.

The rule contended for by the plaintiffs in error is, I think, founded in principle and necessary for the purpose of justice,

and is in perfect analogy with the decisions in civil and criminal cases, so far as those decisions have gone. The opinion I have now expressed I formed early in the arguments at the bar. I have carefully considered all that has been urged at the bar, or suggested by the majority of the Judges, against it, but I have not found any reason for altering my original opinion.

LORD CAMPBELL. — It is now my duty to state to your Lordships the opinion which, after great consideration, I have formed upon the questions of law raised by this record; and to these, of course, I shall strictly confine myself. In the first place, I have no doubt that there are various good counts in this indictment. A conspiracy to effect an unlawful purpose, or to effect a lawful purpose by unlawful means, is, by the common law of England, an indictable offence; and it is fit that, if several persons deliberately plot mischief to an individual or to the State, they should be liable to punishment, although they may have done no act in execution of their scheme. Where they have actually done what they intended to do, it may be more proper to prosecute them for their illegal acts; but, in point of law, they remain liable for the offence of entering into the conspiracy.

The first five counts of this indictment clearly charge the defendants with having conspired together to effect unlawful purposes. The fifth count was strongly objected to; * 404 but I consider that any person * who deliberately attempts to promote feelings of ill-will and hostility between different classes of her Majesty's subjects — to make the English be hated by the Irish or the Irish to be hated by the English — is guilty of a most culpable proceeding; and that, if several combine to do so, they commit a misdemeanour for which they may be indicted and punished. I have entertained some doubt whether the eighth count does more than charge a design to show the inefficiency of certain tribunals, that others, more efficient, may be substituted for them by the legislature, — in which case it would be insufficient; although a conspiracy generally to bring into discredit the administration of justice in the country, with a view to alien-

ate the people from the government, would certainly be a misdemeanour. The subsequent counts appear to me unexceptionable.

I am clearly of opinion, that the plea in abatement was bad in form, if not in substance, — for not giving the names of the witnesses on whose evidence the indictment is alleged to have been found; for not averring that there were not other witnesses, duly sworn, on whose evidence the indictment might have been found; and for not showing that the witnesses who were examined could not, on account of their religious profession, have been lawfully examined without being sworn at all.

I think the Court of Queen's Bench was fully authorized to continue the trial in the vacation, and that the order for this purpose, though conditional, was quite sufficient; for if it had been absolute, it could only have operated upon the contingency of the trial not being finished before the expiration of the term. At common law, the want of the entry of a continuance after the verdict would have been *fatal; but the trial took place under the statute, *405 and in my opinion the rule of the common law, requiring a continuance, does not apply.

The omission of an entry in the judgment, in respect of the parts of the indictment on which there was an acquittal, cannot be the subject of a writ of error, as the defendants cannot thereby be in any degree prejudiced.

The question raised by the writ of error *coram nobis* is more doubtful. The assignment of error in respect of the witnesses not having been sworn in Court under 56 Geo. 3, c. 87, is free from the defects which are fatal to the plea in abatement, and calls upon us to decide whether that statute, as to the Court of Queen's Bench in Ireland, is repealed by the 1st & 2d Vict., c. 37. Had this been *res-integra*, I should have held, notwithstanding the general title and preamble of the latter statute, that, from the enacting clause, the finding of indictments in the Court of Queen's Bench was *casus omissus*, this Court being neither the assizes nor quarter sessions; but when I am informed of the practice under it in Ireland, and I find a general intent in it which possibly may

sustain that practice, I would rather advise your Lordships to consider that the witnesses were sufficiently sworn by the foreman of the grand jury. I have no difficulty in overruling Mr. Steele's point, that there is no statement written on the indictment of the names of the witnesses sworn, as the words of the statute on this subject must be taken to be merely directory.

I was, at first, much struck with the objection to the validity of the judgment, by reason of the form of the recognizance into which the defendant is required to enter; and I
* 406 am by no means free from doubt * upon it now, although I am not prepared to say that it would be a sufficient ground for a reversal. It must be taken to be part of the sentence pronounced upon the defendant for the offences of which he has been found guilty, and it cannot be separated from the fine and imprisonment: so that, if it be clearly contrary to law, the whole would be vitiated. The defendant is ordered to enter into "a recognizance, with two sufficient sureties, himself in 5000*l.*, and each surety in 2500*l.*, conditioned to keep the peace and to be of good behaviour for the space of seven years next ensuing the acknowledgment thereof." I believe there is no precedent for such a recognizance, and it might lead to perpetual imprisonment. A recognizance required, in the common form, for a certain term from the sentence, or from the expiration of the imprisonment, could not be the means of detaining the party in custody beyond the term for which the recognizance was to be given, and at the end of that term he would be discharged, although no recognizance had been entered into. But here, the time when the recognizance would expire is left entirely undefined; and if the defendant cannot get two sureties to join him to the required amount, he must die in gaol. This is quite different from the payment of a fine, which depends upon his own act. Magna Charta provides that no fine shall be imposed beyond what the party is able to pay, and a Court of Error must presume that any fine which is imposed may be paid by him; but the Court passing sentence cannot ascertain, and does not attempt to ascertain, that others will be willing to become bound for the good conduct of the defend-

ant ; and therefore I think it ought, according to invariable usage, so to frame the sentence that, after having been in close * custody during the time for which the recog- * 407 nizance was to be given, the defendant shall be restored to his liberty. In this case the Court could not have meant that, in any event, the defendant should remain in gaol beyond the seven years ; yet, from the language employed, the period of imprisonment may be indefinitely prolonged. Lord Chief Justice TINDAL, in delivering the opinion of the Queen's Judges on this point, said, " The defendants have, under this sentence, the power to enter into the recognizance *instanter*, and thereby shorten the term for the suretyship to six years after the imprisonment has ended." But, with the most sincere deference for such high authority, I must be permitted to doubt whether the power is to be assumed of doing an act depending on the will of others over whom the party required to do it has no control.

I feel still more difficulty when I come to the next question, by far the most important arising in the present case ; for, while many of the others resolve themselves into mere technicalities, this touches the pure administration of justice, and is of the greatest interest to us and to our children, — I mean the constitution of the jury by whom the defendants were tried. The facts we must take entirely from the challenge to the array. It has been truly said, that the demurrer to the challenge is not by any means an universal and absolute admission of the truth of the facts there alleged ; but we are to take them as true, in considering the validity of the challenge. Now this statement shows most distinctly, that, through the designed violation of an Act of Parliament, the defendants were prevented from having a proper jury ; and the only question is, whether a challenge to the array is a remedy which the law allows them ? They say, by their challenge, * that the recorder of Dublin, * 408 having corrected and signed the separate jury-lists, did not make out the general list, as he ought to have done, according to the statute, but (without imputing any corruption to him) " that a paper writing, purporting to be a general list made out from such lists, corrected and signed as

aforesaid, was illegally and fraudulently made out by some person or persons unknown," and that this paper writing omitted fifty-nine persons, whose names are set out, who were duly qualified, and were in the lists so corrected and signed, and ought to have been placed on the general list from which the jurors were to be taken; that the jury-book was made up from this fraudulent paper writing; that the list of special jurors for the current year 1844 was made from this book, omitting the fifty-nine names; and that the panel made and returned to try the issue between the Crown and the defendants was arrayed and constructed from the said list purporting to be the special jurors list for the year 1844, to the manifest wrong and injury of the defendants. Having negatived any privity in this fraud, and averred that it was known to the clerk of the Crown and the Crown solicitor before the panel was arrayed, they pray that the panel may be set aside and quashed.

Now if these facts are true, I consider it quite clear that the defendants ought not to have been tried by a jury so struck. We have not here a mere casual omission of names, without working any injury; but we have a positive averment, that there was a designed and fraudulent omission, and that thereby the defendants were prejudiced. So much they assert, and so much they would have been bound to prove if the challenge had been traversed. We are not told

by the record how the prejudice was worked by the
 * 409 * omission; but this prejudice must have been satisfactorily established, or the issue upon the traverse must have been found for the Crown. Still it is possible that a challenge to the array may not be the appropriate remedy; and the Queen's Judges forcibly point out, that the ground of a challenge to the array has hitherto been "the unindifferency or default of the sheriff," and that here no blame is imputed to the sheriff. But though this answer is entitled to great weight, I cannot say that it is satisfactory to my mind. At common law, the whole execution of the jury process was committed to the sheriff, and there could be no miscarriage in this stage of a suit, unless through his unindifferency or default. A personal charge against him,

therefore, was the ground of the challenge, and this being established, the coroner or elisors were substituted, to whom fresh process was awarded. By the modern Jury Act, the sheriff is entirely superseded in these functions, and a different machinery is provided for the due formation of juries. There being hardly any longer the possibility of any complaint against the sheriff, was it intended by the legislature that the subject should be left without a remedy, to which, as of right, he might resort, if now, through the gross negligence or corruption of others, a panel of jurors should be illegally returned, from whom the parties cannot expect equal justice? I conceive the principle of the common law to be, that under such circumstances, upon a challenge to the array, the panel shall be quashed; and this principle would apply where the panel is framed by new functionaries, just as much as when all was left to the sheriff, although the form of ulterior proceeding would be varied. No other remedy is suggested; and, after the able and astute speech of my noble and *learned friend the Lord * 410 Chancellor, we may safely assume that no other remedy can be suggested. A challenge to the polls would be unavailing where the objection is to the body of the panel, and in the present case would be utterly useless, the objection being, that names allowed and adjudicated upon by the recorder are omitted. I think you cannot refer a party so aggrieved to the discretionary jurisdiction of the Court, to be exercised summarily, without trial by the country, and without power of appeal. A motion to quash the panel would be attended with equal difficulties, and might receive a similar answer.

The learned Judges say, that "no object or advantage would have been gained if the challenge had been allowed; as in that case the jury process must have been directed to some other officer, who would have been obliged to choose his jury out of the very same special jurors book." But I must be permitted to take an entirely different view of the duty of the Court of Queen's Bench, had the challenge been allowed. There being no complaint against the sheriff, there would have been no ground for superseding him. The

Court, I conceive, would have given redress according to the nature of the grievance. Seeing that the vice lay in the jurors book, they would have directed the necessary steps to be taken to have it reformed; and if this was impossible, and a fair jury could not be struck by consent, they might have directed the panel to be taken from the jury-list of the preceding year, the statute authorizing this step, where, for the current year, no sufficient jury-list has been framed. It has been said that the jury-list of the former year could not be resorted to, because a list *de facto*, though a defective one,

had been made up for the present year; but if it is
 * 411 not *made up according to the statute, it is to be treated as a nullity.

The proceeding I suggest would be new; but it seems to be inevitably required by the new statute altering the mode by which juries are returned. Let me remind your Lordships of the convincing answer given by the Judges to the want of a continuance on the record after the verdict; that the old common-law mode of entering a continuance was incidentally abrogated by the statute which allowed a trial at bar in vacation. The same principle, in my humble opinion, would now authorize the Court to quash the panel, and to do what is necessary for assembling a fair jury, although no complaint is or can now well be made in respect of the indifference or default of the sheriff. Unconvinced by the reasoning of the learned Judges, still I should hardly have ventured to advise your Lordships to reverse the judgment merely on the ground that the challenge to the array was overruled; although, after hearing the admirable observations made on this point by my noble and learned friend, the Lord Chief Justice of England, and knowing that I have the concurrence of that very acute, learned, and cautious Judge, Mr. Justice COLERIDGE, I entertain little doubt that the challenge ought to have been allowed.

But I now come to considerations which induce me without hesitation humbly to give your Lordships this advice. The learned Judges are unanimously of opinion that the sixth and seventh counts of the indictment, stating generally conspiracies to effect changes in the government and a repeal of the legis-

lative union, by intimidation and a display of physical force, are bad ; and I am clear that they are so, as they give the defendants no information of the specific * offences * 412 which they have to answer. Again, the learned Judges are unanimously of opinion that the findings of the jury on the first, second, and third counts of the indictment are contrary to law ; and I am clear that they are so, as the defendants are on each count found guilty of several conspiracies, although only one is charged. A very learned Judge, Mr. Justice PATTESON, thinks that all that follows the finding of the first conspiracy on each may be rejected as surplusage ; but there seems the greatest difficulty in giving effect to the first, more than to the second finding ; for each of them standing alone would be regular, and little importance can be ascribed to the order in which they are supposed to be delivered by the jury. All the other Judges think that these findings are wholly bad, and that no judgment could be supported by any of them.

Then, can the general judgment stand, professing to proceed on the bad counts and the bad findings, as well as on other good counts and good findings ? Agreeing with Mr. Baron PARKE and Mr. Justice COLTMAN (and I think it most unfair to try to discredit them by any expressions of diffidence which either of them may have used out of respect to their brethren from whom they differed), my opinion is, that part of the punishment must be taken to be awarded in respect of the supposed offences charged in the sixth and seventh counts, which do not amount to offences in point of law, for which the defendants are answerable ; and part in respect of the offences duly charged in the first, second, and third counts, of which they have not lawfully been found guilty.

This is clearly the language of the record, to which faith must be given. After setting forth the eleven counts of the indictment, with the findings upon each, * re- * 413 peating in so many words the charges in the first three counts, it thus proceeds : “ Whereupon, all and singular the premises being seen and fully understood by the Court of our said Lady the Queen now here, it is considered and adjudged by the said Court here, that the said defendant, for his offences aforesaid, do pay a fine,” &c. There is no *nolle*

prosequi as to the bad counts, and nothing to prevent the judgment from applying to the defective findings, or the counts on which there was no lawful verdict; because all the counts and all the findings were believed in the Court below to be sufficient. Therefore, according to the plain use of language and the common sense of mankind, by this judgment the defendants are punished for charges which do not amount to crimes in the eye of the law, and for crimes of which they have not been lawfully convicted.

But with respect to the bad counts, it is said there is a rule of law, that if there be any one good count in an indictment, which, standing alone, would support the judgment, it is not vitiated by any bad counts on which it likewise proceeds, and that we must presume that the Court below awarded the whole of the punishment in respect of the good count alone. I must say that it would be very strange if there were any such binding rule, for it would be quite contrary to the analogy of our law, and it might lead to great hardship and injustice. There is a clear distinction between an indictment consisting of one count sufficiently charging an indictable offence, with some irrelevant matter in it, and an indictment containing two counts charging separate offences; one being good, the other bad. The irrelevant matter in the good count

is to be wholly disregarded, and no advantage can be
 * 414 taken of it; *utile per inutile non vitiatur*: but the separate count is considered a separate indictment.

There may be one plea to the one count, and another plea to the other. There may be a demurrer to the bad count, and in that case there is no dispute that the opinion of a Court of Error may be taken on its validity. After verdict there may be a motion in arrest of judgment on the bad count, though sentence would be passed on the good count. The Lord Chief Justice has given a remarkable instance of this, in the case of *The Queen v. Feargus O'Connor*, (a) in which a motion in arrest of judgment was made upon one count, and the Court gave a separate opinion upon that count.

But we are told that if the motion in arrest of judgment is

(a) See *ante*, p. 376.

improperly overruled, and sentence is passed upon the defendant, and he is punished for the supposed offence in the bad count, as well as the real offence in the good, he is entirely without remedy. The presumption that the Court below must be taken to have known which counts are good and which are bad, and to have awarded punishment only in respect of the good counts, is wholly at variance with the spirit of our jurisprudence, which supposes that Judges are fallible; and anxiously provides the means of correcting their mistakes, by motions for new trials, bills of exception, writs of error, and appeals. Such a presumption would sometimes be a presumption, not only contrary to the record, but contrary to the fact; as in this very case, in which it appears by the reports that all the Judges of the Court of Queen's Bench in Ireland held the sixth and seventh counts of the indictment to be unexceptionable, and could not have excluded them from consideration in meting out the punishment.

* It is an utter mistake to suppose that there is only * 415 one *corpus delicti* which is made the subject of several counts in one indictment. Even with respect to the felony, the law supposes a separate offence to be charged in each count; and in misdemeanours there are not unfrequently in the different counts entirely different offences—of different sorts—committed at different times; as in *Rex v. Benfield*, (a) for riots and libels. Therefore the following case, according to the doctrine contended for, may well happen: There may be an indictment containing two counts for separate offences, A. and B.; A. being a good and B. a bad count. The Judges in the Court below may think B. good, and A. bad, and sentence the defendant to a heavy punishment merely in respect of B., which may be connected with killing game, and attended, in their estimation, with great moral turpitude, though the matter charged may not really amount to an offence in law. On a writ of error, the Court above clearly sees that B. is a bad count, but cannot reverse the judgment, because there is count A. in the indictment, and though only

(a) 2 Burr. 980.

for a common assault, would support the heavy fine and imprisonment imposed in respect of count B. I may suppose another indictment, with two counts, and a separate demurrer to each count overruled; with a general judgment that the defendant, for his offences aforesaid, shall be fined and imprisoned. Is it to be said, that if he brings a writ of error, and shows one count to be bad, he shall have no relief unless he show the other count to be bad also?

Let us see what authority there is for a doctrine which would lead to such strange consequences. First, we *416 are told of the opinion of the profession. I *have certainly heard it said very often, that if there be one good count in an indictment, it is sufficient, notwithstanding bad counts; and in a certain sense this is perfectly true. A defendant being convicted generally upon an indictment containing several counts, if one of them be good, he cannot get scot-free by a general motion in arrest of judgment; and it is most fit that he should be sentenced on the good count, although there may be bad counts in the indictments. I am aware that this notion has sometimes been carried further, to a writ of error; but without any principle, and without any decision to warrant it. The *dictum* of Lord MANSFIELD, so much relied upon, that "when there is a general verdict of guilty on an indictment consisting of several counts, if any one of them is good, that is sufficient," is perfectly correct; but he is evidently referring to a general motion in arrest of judgment, in the Court where the trial took place, and not in the slightest degree to a Court of Error. His lamentation, "that the rule prevails in civil cases, that where there are several counts in a declaration, and general damages, if one count be bad, there must be a new trial," is only lamenting what is as inevitable as fate, for all mankind must allow that it could not be overturned without working the most manifest injustice. Where there are bad counts in an indictment, with a general judgment, and bad counts in a declaration, with a general verdict, a Court of Error in the one case, and the Court below in the other, are placed exactly in the same predicament, being unable to distinguish what portion of the punishment, or what portion of the dam-

ages, is awarded in respect of the good counts and of the bad. I do not seek in the remotest degree to infringe or relax the rule in criminal cases which Lord MANSFIELD has laid down.

* *The King v. Mason* (a) and *Young v. The King* (b) * 417 are very properly cited; for they are cases in which the point might have been made, and was not made; but they prove no more. *Hill's Case* (c) amounts absolutely to nothing, as the Judges had no authority to consider any thing beyond the point reserved at the assizes, whether there was any good count in the indictment. In *The King v. Powell*, (d) in which it was held that the word "misdemeanour" in a judgment was *nomen collectivum*, and might apply to the offences stated in two counts of an indictment, the question we are now considering did not arise, and never was thought of at the bar or on the Bench. There both counts of the indictment were good, the finding of guilty applied to both, and the sentence of hard labour must of necessity be ascribed to the count which would warrant it. The offence in the other count must be supposed likewise to have been taken into consideration in passing sentence, and a portion of the imprisonment may well be supposed to have been awarded in respect of it. Again, an indictment for perjury is not vitiated by one defective assignment, if it contains others which are sufficient; but the perjury charged is considered one offence, which the assignments are offered to substantiate, and one good assignment must suffice. The case where the question arose was only a motion in arrest of judgment, and does not apply to a writ of error. There is therefore no text-book, nor decision, nor *dictum*, to support a doctrine so entirely contrary to principle. To my utter astonishment, principle and authority failing, it is rested on the ground of expediency; and if it were at all necessary to the due administration of the * criminal justice of the country, * 418 I should not resist it, however anomalous it may be. But not an instance has been put where serious inconvenience

(a) 2 T. R. 581.

(c) Russ. & R. 190.

(b) 3 T. R. 98.

(d) 2 B. & Ad. 75.

would arise from upsetting it. In an indictment for murder there may still be different counts varying the mode of committing the crime, or any other particular as to which the evidence may be doubtful. Although there may be a bad count in the indictment, sentence may without difficulty be passed on a count which is good.

I understand from my very learned friend, Mr. Baron ROLFE, that upon a late trial before him for murder, after a general verdict of guilty, there was a motion in arrest of judgment, upon a suggestion that there was a bad count in the indictment. He did what might have been expected from him. Seeing that there was a good count in the indictment to which the evidence applied, he proceeded to pass sentence on that count; and under similar circumstances, he will do exactly the same after this judgment is reversed. It is absurd to suppose, that when the Judge at the trial refuses to arrest the judgment, there being one good count in the indictment, he means that judgment shall be entered up on the good and on the bad counts indiscriminately, so that his judgment may be reversed by a Court of Error. If, from the gross carelessness of those employed to conduct the prosecution, the judgment is so entered up, it is not the judgment which he must be supposed to have pronounced, and it ought to be reversed. There is no pretence for the argument that, in refusing generally to arrest the judgment where there is a bad count, a judgment is necessarily pronounced which, according to the doctrine I contend for, must afterwards be reversed. Strictly speaking, where only one felony is proved,

there ought to be a verdict of guilty only on one count;

* 419 but *in cases of felony it can seldom be worth the prisoner's while to avail himself of this right, and the present practice will not be at all affected. In cases of misdemeanour, more care may hereafter be required in framing indictments, and entering up verdicts and judgments; but I have no hesitation in saying, that this would be a great improvement in criminal proceedings. According to the present loose system, the framer of an indictment, having got one count good in law, goes on to draw others more and more vague and attenuated, and requiring less and less proof;

till he involves the accused in the most perplexing generalities, and there is the greatest difficulty in knowing what is the charge to be repelled. But even if bad counts are inadvertently introduced, the mischief of them may be easily obviated by taking a verdict of acquittal upon them, by entering a *nolle prosequi* to them, or by seeing that the judgment is expressly stated only to be on the good counts, which alone would prevent the bad counts from invalidating the judgment upon a writ of error.

With respect to the unauthorized findings, in which the jury have taken such unexampled pains to get wrong, and which present a question entirely new for your Lordships' consideration; it is admitted by all the Judges, except Mr. Justice PATTESON, that, if any punishment is supposed to be awarded in respect of any part of the first three counts, the judgment cannot be supported. But your Lordships are asked to presume that the Judges of the Court of Queen's Bench in Ireland were well aware that there was no sufficient verdict upon any of these three counts, and awarded no punishment in respect of them. This again would be a presumption against the fact, as well as the averment of the record; for complaint was made by *the learned counsel for the * 420 Crown, at your Lordships' bar, that no objection had been taken to these findings in the Court below; and it is quite clear that there was no misgiving respecting them in any quarter, till this writ of error was brought. In truth, these three counts contain the most serious charges, and several — such as a conspiracy to excite disaffection in the army — which are not repeated in any of the good counts on which there is a valid verdict. We cannot resort to the palpably incredible fiction, that the Judges, in violation of their duty, did not consider the guilt of the defendants aggravated by the charges in these three counts, and proportionally increase their punishment.

I allow that a Court of Error is wholly incompetent to inquire whether discretionary punishment for an offence of which the defendant is lawfully convicted is reasonable or excessive. But a Court of Error may and is bound to inquire whether punishment has been inflicted for that which is no

offence in point of law, or for offences of which the party has not legally been found guilty. I allow also that your Lordships ought not to reverse a judgment unless you see distinctly that it is erroneous. But this judgment appears to me clearly to be erroneous, in awarding punishment for charges which are not offences in point of law, and for offences of which the parties have not legally been found guilty; and therefore when the question is put that it be reversed, I shall say, Content.

Notwithstanding some observations of my two noble and learned friends who first addressed you, leading to an entire abandonment of the judicial functions of this House, and a denial to the subject of the relief which the Constitution has provided in case of erroneous judgments in the Courts
 * 421 below, — I need hardly * press upon your Lordships, that you are not bound by the opinion of the majority of the Judges whom you thought fit to consult, although the opinion is entitled to the highest possible respect. The appeal is not from the Irish Judges to the English Judges, but to this Chamber of the Imperial Parliament, — which I hope will long continue satisfactorily to administer justice in the last resort to all the inhabitants of the United Kingdom.

The Lord Chancellor, from his place on the woolsack, put the question, “Is it your Lordships’ opinion that the judgment of the Court below in this case be reversed? As many of your Lordships as are of that opinion will say ‘Content.’”

Lords COTTENHAM, CAMPBELL, and DENMAN, answered “Content.”

THE LORD CHANCELLOR. — As many as are of an opposite opinion will say “Not content.”

Lord BROUGHAM and one or two other peers said “Not content.”

The Lord Chancellor made no declaration of what he considered to be the opinion of their Lordships. After a pause

of some moments, the noble and learned Lord again put the question in the same terms, and with the same result.

LORD WHARNCLIFFE (who, according to usage in such cases, addressed the House from his seat) said: My Lords, in this state of things I cannot help suggesting that your Lordships should not divide the House upon a question of this kind, when the opinions of the law Lords have been already given upon it, and the majority is in favour of reversing the judgment. In * point of fact, my Lords, they consti- * 422 tute the Court of Appeal; and if, departing from what the practice has ever been, noble Lords unlearned in the law should interfere to decide such questions by their votes, instead of leaving them to the decision of the law Lords, I very much fear that the authority of this House as a Court of Justice would be very greatly lessened throughout the country. Under these circumstances, and with these views, I beg leave humbly to suggest that such of your Lordships as are not Lords learned in the law, and have not heard the whole case, and cannot be supposed to be acquainted with the whole of the reasoning upon it, and who are therefore not qualified to pass a judgment upon such an occasion, should abstain altogether from voting. It is far better that the character of this House as a Court of Appeal and a Court of Law should be maintained, even though the decision should, in the opinion of your Lordships, be objectionable, as being contrary to that of the Judges, and although it should prove inconvenient in this particular instance; it is, I say, under such circumstances, better to concur in the opinion of the majority of the law Lords, than reverse the judgment of those persons who by their education and station must be best able to decide upon subjects of this nature, and who in reality constitute the Court of Law in this House.

LORD BROUGHAM. — I perfectly agree in the opinions expressed by my noble friend. Differing, as I do, in opinion from the majority of the law Lords, and concurring in opinion with the majority of the learned Judges, both in Ireland and here, on the subject of this judgment, while I deeply lament

the decision which has just been come to, considering,
 * 423 as I do, that it will have a * tendency to, I was going
 to say, shake confidence in this House ; but without
 saying that, deeply lamenting the decision which has now
 been come to, and which I cannot go along with, because I
 think it is a decision which will go forth without authority
 and come back without respect ; nevertheless, I highly ap-
 prove of the view of this matter taken by my noble friend,
 and implore your Lordships who have not heard all the argu-
 ments, who have not made yourselves perfectly acquainted
 with the subject, and whose habits do not lead you to take
 part usually in the discussion of such questions, not to take any
 part in the decision. In justice to myself, and with reference
 to a subject which has been alluded to to-day, I beg to say,
 that when, on a former occasion, I differed from the learned
 Judges on the subject of the Irish marriages, I did so in a
 case which did not at all resemble this case ; and I differed
 from them on that occasion because they differed in opinion
 from the eminent and venerable authority of Lord STOWELL,
 and other learned persons well capable of forming a correct
 opinion upon the subject, and whose decisions carry with
 them the greatest weight and authority. If it had not been
 for that, I should on no account have set up my judgment
 against that of the learned Judges.

LORD CAMPBELL. — I concurred with my noble and learned
 friend in opposing the unanimous opinion of all the Judges,
 in the case of the Irish marriages. I opposed their opinion
 then because I thought it was contrary to the law of Eng-
 land ; and I now oppose the opinion of a majority of the
 Judges, only because I hold that opinion to be equally con-
 trary to the law of England. With reference to the distinc-
 tion between law Lords and lay Lords, and to what
 * 424 has been said as * to leaving the decision of this case
 with the law Lords, it is unnecessary for me to say
 more than that such a distinction is one which is not known
 to the Constitution : but, nevertheless, I think that no Judge
 ought ever to decide a case, all the arguments in which he
 has not heard, and of which he can therefore know compara-

tively nothing. I believe that none but the law Lords have attended to the arguments in this case : it would therefore, I think, be proper that noble Lords who have not heard the case should abstain from voting.

THE LORD CHANCELLOR. — I think those noble Lords, who have not heard the arguments, will decline voting if I put the question again.

The Earl of Stradbroke said that he had considered the subject most attentively, and he was desirous of giving an opinion with respect to it.

THE MARQUIS OF CLANRICARDE. — My Lords, I think it right to say, that if any noble Lord, not learned in the law, who has not heard the whole argument, votes in addition to the law Lords on this question, I shall, as a matter of privilege, think it my duty also to give my vote. In stating that intention, I must also say that I should be very sorry to be reduced to that necessity ; for I should look upon the course of proceeding which would oblige me so to act, to be one of the most calamitous nature to this House and the country ; but I must add, that it is not required in this case, more than in any other, that the particular Lords who vote should be those who have studied questions of this kind. I think it infinitely better that all those noble Lords who are not, in the common acceptation of the term and in the usage of Parliament, qualified to decide, should leave the * House ; and I hope that I shall be allowed to do so, * 425 in common with all other noble Lords who are not lawyers.

THE EARL OF VERULAM. — I agree with the noble Lord who has just addressed your Lordships ; and therefore, with the permission of your Lordships, I will retire.

All the lay Lords then withdrew. (a)

(a) In the following cases, the Lords who were not members of the legal profession took part in the decision :—

The question that the judgment be reversed was again put, when it was carried in the affirmative.

Judgment of the Court below reversed.

Reeve v. Long, Lords' Journals, A.D. 1695; vol. 15, p. 446. Reported in 1 Salk. 227, where it is said that the judgment was reversed, against the opinion of all the Judges.

Bertie v. Falkland, Lords' Journals, A.D. 1697; vol. 16, pp. 230, 240. There are several entries relating to this case, the result of which is thus summed up in Colles's Reports, pp. 10-13, in extracts from the Journals: On hearing counsel on both sides, the debate was adjourned, and all the Lords this day present were to be summoned, and all the Judges also. After hearing counsel again, the question was proposed, whether the appellant shall have any relief in this case, and it was resolved in the affirmative, against which there was a protest of twenty-one dissentient peers; on which there was another day appointed for considering the case, and there was a division, and thirteen peers dissented from the resolution.

Ashby v. White, Lords' Journals, A.D. 1703; vol. 17, p. 369. The judgment of the Court of Queen's Bench was reversed; but four bishops and nine lay Lords declared their dissent from the reversal. This case, though within the period of Colles's Reports, is not printed by him. The case is reported in the Queen's Bench, 2 Lord Raym. 988; 6 Mod. 45; 1 Salk. 19; and in Parliament, 1 Bro. P. C. 62. In the report in Lord Raymond, where the final result is mentioned, it is said that Chief Justice Trevor and Baron Price were of opinion with the three Judges of the Queen's Bench; and that Chief Baron Wood, and Barons Berry and Smith agreed with Lord Holt; that Tracy doubted; and Neville and Blencowe were absent. In Salkeld the first part of the statement is the same; but the reporter then adds generally, that "the rest of the Judges" agreed with Lord Holt. Both reporters represent that sixteen Lords (which is erroneous) agreed with the three Judges of the

Queen's Bench, and fifty voted in favour of the opinion expressed *426 *by Lord Chief Justice Holt. The report in Brown's Parliamentary Cases says nothing of the opinions of the Judges, nor of the majority of the Lords, but records the names of the thirteen dissentient Lords, as they are stated on the Journals; namely, the Bishops of London, Rochester, Chester, and St. Asaph; and Lords Rochester, Northampton, Scarsdale, Weymouth, Granville, Gower, Abingdon, Guernsey, and Guildford.

Douglas v. Hamilton (known as the Douglas Cause), Lords' Journals, A.D. 1769; vol. 32, p. 264. Lords Camden (Lord Chancellor) and Mansfield (Chief Justice of K. B.) advised a reversal of the judgment of the Court below, and the motion was carried; but the Duke of Bedford and Lords Bristol, C. P. S., Sandwich, Dunmore, and Milton, entered a pro-

test against the decision. The speeches of Lords Camden and Mansfield are printed in the *Collectanea Juridica*, vol. 2, p. 405.

Alexander v. Montgomery, Lords' Journals, A.D. 1773; vol. 33, p. 519. On the question whether the interlocutors complained of should be reversed, the votes were equal, four and four; when the ancient rule of law, *semper præsumitur pro negante*, applied, and the judgment was affirmed.

Hill v. St. John, Lords' Journals, A.D. 1775; vol. 34, p. 443. The judgment of the Court of Common Pleas had been reversed in the Court of King's Bench. The Barons of the Exchequer were summoned to attend the Lords, and Lord Chief Baron Smythe concurred with the Court of King's Bench, and Barons Burland and Eyre with the Court of Common Pleas; "which latter opinion was also strongly supported in argument," says Sir W. Blackstone, "by Lord Apsley (Lord Chancellor) and Lord Camden, the only law Lords in the House." But the motion to affirm the judgment of the King's Bench was carried without a division. See 2 Sir W. Bl. Rep. 930, and 3 Bro. P. C. 375.

The Bishop of London v. Ffytche, Lords' Journals, A.D. 1783; vol. 36, p. 687. The judgment of the Court of Common Pleas had been given for the plaintiff; that judgment was affirmed in the King's Bench. Seven Judges gave opinions in favour of the judgment of the Court below. One was for reversing it. Lord Thurlow, and the Bishops of Salisbury, Bangor, Llandaff, and Gloucester, were for reversing the judgment. Lord Mansfield (Lord Chief Justice), and the Duke of Richmond, for affirming it. The judgment was reversed. The Journals do not state the numbers on the division; but in the report 2 Bro. P. C. 211, and in Cunningham's *Law of Simony*, p. 52, where the speeches are fully given, and also in 1 East, 487, it is said that the reversal was carried by nineteen to eighteen.

1844.

SAMUEL GRAY *Plaintiff in Error.*
 HER MAJESTY THE QUEEN *Defendant in Error.*

Felony. Peremptory Challenge.

The right of a defendant to a peremptory challenge of jurors to the number of twenty exists in all cases of felony, and is not confined to those which are punishable capitally.

The law is, in this respect, the same in Ireland as in England.

July 1; September 2, 1844.

AN indictment was preferred in 1842, at Monaghan, in Ireland, against Samuel Gray, framed upon the Statute 1 Vict. c. 85; (a) and it charged the defendant, in the first count, with feloniously, unlawfully, and maliciously shooting at one James Cunningham, with intent to murder him; and, in the second count, with feloniously, unlawfully, and maliciously shooting at James Cunningham, with intent to do him grievous bodily harm. Gray pleaded Not guilty. On this indictment he was tried at the Monaghan Lent Assizes, 1842; and in consequence of the illness of one of the jurors, the jury was discharged from giving a verdict. He was again tried at the Summer Assizes, 1842, and the Lent Assizes, 1843; and on each occasion the jurors disagreed about their verdict, and

(a) By which it is enacted (sect. 8), "That whosoever shall shoot at any person, or shall by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, with intent to commit the crime of murder, shall, although no bodily injury shall be effected, be guilty of felony," and be liable to transportation. Sect. 4 is similar in its provisions, except that the intent there provided against is, the "intent to maim, disfigure, or disable, or to do some other grievous bodily harm." The punishment is the same in this as in the preceding section.

were discharged. The indictment was then removed by * the Crown into the Court of Queen's Bench, at * 428 Dublin, by writ of *certiorari*; and in Easter term, in the year 1843, Gray being called upon to plead to the indictment, pleaded specially *autrefois acquit*, stating, in substance, that he had been already tried for, and acquitted of the murder of one Owen Murphy, and that the murder of Owen Murphy was the same identical transaction as the felonious shooting of James Cunningham, now charged against him; and that the murder of Owen Murphy and the felonious shooting at Cunningham were one and the same felony, and together formed and constituted one entire felonious transaction; and that consequently the jury could not have acquitted Samuel Gray upon the charge of the murder of Owen Murphy, without also acquitting him, by necessary implication, upon the charge of feloniously shooting at James Cunningham. This plea was demurred to upon the part of the Crown, and Gray joined in demurrer. In Trinity term, 1843, the Court of Queen's Bench decided that this plea was not sufficient in law, and gave judgment of *respondeat ouster* against Gray accordingly; (a) and thereupon he pleaded Not guilty. The record was sent down for trial to the Summer Assizes for the aforesaid county of Monaghan, in the year 1843. Upon the trial Gray challenged, as they were called into the box, and before they were sworn, two of the jurors, William Charles Waddell and James Kelly, peremptorily, and without showing any special cause or ground of challenge. These challenges were demurred to respectively on the part of the Crown, and such demurrers were allowed by the Court, and the challenges overruled; (b) and the indictment was * tried accordingly by the said * 429 W. C. Waddell and J. Kelly, and ten other jurors,

(a) 5 Brady, M'Causland, Jones & M. 524.

(b) Irish Circ. Rep. 420. The demurrer depended on the construction of the 9 Geo. 4, c. 54, § 9; by which it is provided that "no person arraigned for treason or murder, or for other felony, shall be admitted to any peremptory challenge above the number of twenty." This statute had repealed (among a great many others) the 10 & 11 Char. 1, c. 9, which had contained a proviso in the same terms.

who returned a verdict of Guilty. In the Hilary term following Gray moved to arrest the judgment of the Court of Queen's Bench, upon the ground that his above-mentioned challenges had been disallowed contrary to law. This motion was (Mr. Justice PERRIN *diss.*) refused by the Court, (a) and judgment of transportation for life was given against him. The present writ of error had been brought to reverse this judgment of the Court of Queen's Bench in Ireland.

The Judges were summoned; and Lord Chief Justice TINDAL, Lord Chief Baron POLLOCK, Justices PATTESON, WILLIAMS, COLERIDGE, COLTMAN, and WIGHTMAN, and Barons PARKE and GURNEY, attended.

Mr. Napier and Mr. Dawson, for the plaintiff in error. — This is the case of an indictment founded on the 1st Vict. c. 85, §§ 3 & 4; and the question is, whether, upon an indictment under that statute, the prisoner has a right to a peremptory challenge of the jurors. The negative of this question will be contended for on the other side, upon the ground that the life of the party is not in danger; but it is submitted on the part of the plaintiff in error, that a right to peremptory challenge is incident to a felony of every kind, whether at common law or by statute; for that the simple creation of a felony by statute gives it all the incidents which attend any existing felony. Here the case is stronger; for the
 * 430 felony is not now created * for the first time, but remains a felony as at common law, the punishment only having been altered. It is therefore submitted, secondly, that where the punishment alone has been changed by statute, all the other incidents of the offence remain, and that nothing is altered except what is included in the words of the statute. The authority for this latter proposition is distinctly stated in the *Coalheavers' Case*: (b) “The Judges determined that this offence was a new-created felony, and therefore that it must necessarily possess all the incidents which appertain to felony by the rules and principles of the

(a) Joy on Peremptory Challenge of Jurors, Append. i.

(b) 1 Leach's Cro. Cas. 66.

common law ;” and the case goes on to say, that of these rules and principles, “one of the most important incidents is the right of challenge, especially to the polls.” The importance of the right cannot be doubted : on its free exercise depends, in a great measure, the prisoner’s security for obtaining a fair trial. Lord COKE says (a) that, “by the common law, in cases of high treason or misprision of treason, a man may challenge thirty-five peremptorily, which is under three juries ; but more he cannot.” This statement of the law is supported by Lord Chief Baron COMYNS, who says, “So in petit treason or felony, by the common law, he might challenge thirty-five, which is now restrained by the Statute 22 Hen. 8, to 20, without cause shown ;” (b) an opinion which he afterwards repeats in another place. (c) Other authorities (d) are to the same effect, and distinctly describe the rule as applicable to felony. In so stating it they do not describe any particular felony, but use the word without restriction.

Thus the rule extends to felony, as a class of crime ;
 *but to strengthen the present argument, that the * 431
 right does not depend exclusively on the punishment being capital, it will be shown to extend to misprision of treason, which was a high misdemeanour, but no felony. This is important as an answer to the supposition that the right only existed in cases where death was the punishment of the offence. The punishment of death is not essentially consequent on the crime of felony, but the right to peremptory challenge is essentially incident to the offence. The personal punishment is not of the essence of the offence of felony. Hawkins thus defines it : (e) “Felony, which *ex vi termini*, signifies ‘quodlibet crimen felleo animo perpetratum,’ and can be expressed by no periphrasis or equivalent, without the word *felonice*.” This is partly taken from a pas-

(a) 3 Inst. 27.

(b) Com. Dig. Chall. C. 1.

(c) Dom. Dig. Justices, W. 2.

(d) Finch Law, 414, tit. “Challenge ;” Bro. Abr. Chall. 86; Fitz. N. B. Chall. 162; 1 Inst. 156 b.

(e) Pleas of the Crown, Bk. i., c. 7, § 1, 8th edit. by Curwood.

sage in the First Institute, where Lord COKE gives (a) a definition from Glanvil, in these words: "Quodlibet *capitale* crimen, felleo animo perpetratum." This Hawkins corrects, as well in his Pleas of the Crown as in his Abridgment of the First Institute, by omitting the word *capitale*, which is important in considering this case, although it may be found that the original meaning of this word did not imply that the convict should suffer death. Lord COKE himself did not consider the epithet *capitale* to be confined to all offences, of which those who might be convicted would be punishable with death; because he says, in the same page, that under felony, in commissions, is included *inter alia*, chance medley, *se defendendo*, and petit larceny; and he adds, "For such of these crimes, for which any shall have this judgment, to be hanged by the neck till he be dead, he shall forfeit all
 * 432 his lands * in fee-simple, and his goods and chattels.

For felony by chance medley, or *se defendendo*, or petty larceny, he shall forfeit his goods and chattels, and no lands of any estate of freehold inheritance." Blackstone refers to and adopts these remarks; for he says, (b) "Hence it follows that capital punishment does by no means enter into the true idea and definition of felony." It is not liability to death, but liability to forfeiture, that is of the essence of a felony; and such Blackstone states to be an inseparable incident and the true criterion of felony. Even that, however, is not quite accurate; for there may be an offence liable to forfeiture of lands or goods, or both, as misprision of treason, without its being a felony. It would be singular if the rule as to challenge should in terms be applied to felony, and the reason of the rule, as a test of its practical allowance, depend on a casual consequence, not on an essential property of felony. And it would be still more singular if the same rule should in terms be applied to misprision of treason, from which it must be excluded by the reason employed to limit it in the case of felony. There is, in truth, no such strange inconsistency in the law. The common

(a) Co. Litt. 391 a.

(b) 4 Bl. Com. 97.

incident of both offences is forfeiture. If the rule depends on any incident of the offence to which it applies, it cannot be upon the personal punishment, which has often fluctuated, but must be upon a permanent incident, common to all the offences to which it in terms extends. Now forfeiture is common to all.

But it will be said on the other side, that most of the text-writers, in giving the rule, speak of the privilege as existing *in favorem vitæ*. This may be true; but the text-writers repeat each other, and repetition alone cannot confer authority on a statement * which was originally errone- * 483 ous. The origin of all these descriptions of the peremptory challenge, is to be found in Lord COKE's First Institute, (a) where this expression, "in favour of life," is used; but that he did not consider the reason as limiting the rule is evident from the fact of his there referring to the case of misprision of treason as one in which the right of peremptory challenge existed, though that is one to which the reason assigned for the rule in treason or felony could not apply. In another place Lord COKE says, (b) that, "if a man be nonsuit in an appeal of mayhem, it is peremptory; for the writ says, '*felonice maihemavit*;' " which shows that the word *felonice* decided the character of the offence, for mayhem was not capitally punishable. Comyns (c) states the rule, but does not give the reason; so that he, at least, did not think that the rule was restricted to cases where such a reason could apply. Lord Chief Baron GILBERT, in his History of the Common Pleas, (d) suggests a different reason; namely, that the trial by the petty jury came in the place of the ordeal: and this view of the matter is supported by the case of the Abbot of Strata Mercella, (e) and by Kilham's Laws of William the Conqueror. (g) Blackstone (h) states the rule as to peremptory challenges, doubtfully; saying that it was granted "in criminal cases, or at least in capital ones, *in favorem vitæ*." But one of his commentators (the present

(a) 156 b.

(c) Com. Dig. tit. Chall. C.

(e) Co. Rep. 32.

(h) 4 Comm. 353.

(b) 1 Inst. 139 a.

(d) Page 98.

(g) Pages 15, 31, 79.

Mr. Justice COLERIDGE) suggests that this includes all felonies which in legal theory are capital. And Blackstone himself, in the following page, says that “no person arraigned
 * 434 for felony,” not adding * punishable with death, “can be admitted to make more than twenty peremptory challenges.” In Comyns’s Digest (a) it is said, “By Statute 22 Hen. 8, c. 14, a felon may challenge twenty of the jury peremptorily.” There no distinction is made between those felonies that are capital and those that are not. But the Irish Statute (10 & 11 Chas. 1, c. 9), passed on the same subject, is even stronger, because more general in its expressions. It limits the number in “high treason, petty treason, murder, manslaughter, or any other felony whatsoever.” It is plain, therefore, that the practice in Ireland has no foundation in the words of the statute; the practice in England has always been to allow the challenge in all felonies. If it should be said that the attention of the legislature was not drawn to this distinction between certain classes of felonies; the answer is, that in a statute passed a short time previously (10 Chas. 1, sess. 2, c. 14, § 5), there is a specific designation of those felonies which are punishable with death: so that it is clear that the legislature was fully aware of the distinction.

The analogy drawn from the case of petty larceny will be denied on the other side, and it will be said that petty larceny is not a felony. Between the 22 Hen. 8, c. 14, which was a temporary Act, and the 32 Hen. 8, c. 3, which was a permanent Act, this very point arose. In the Year Book (b) there is an argument on the question, whether the taking of any thing under the value of 12*d.* was a felony or not; and FITZHERBERT, who was then Chief Justice, said, “The indictment shall be that he *felonice* cepit; for it is such a felony that one forfeits all his goods for it, but he shall not lose his life. And

I could show you an ancient book, that he should for-
 * 435 feit his lands for * this.” The doctrine here laid down is adopted by Lord HALE, (c) and by BROOKE, (d) and

(a) Tit. Indictment, M.

(b) 27 Hen. 8, fol. 22, edit. 1620.

(c) 1 Pl. of the Cr. 503, 530.

(d) Bro. Abr. tit. Corone, pl. 2.

in *Bromley's Case*; (a) the last of which shows that on an indictment for grand larceny the prisoner might be convicted of petty larceny. But there are other proofs of the identity of these offences. Among other incidents of petty larceny, the prisoner was refused, as in grand larceny, the privilege of being defended by counsel. Hawkins (b) and Blackstone. (c) The statute which removed this disability (6 & 7 Will. 4, c. 114) made no distinction between them. The two cases likewise resemble each other as to the incidents of a finding of *fugam fecit*; Hawkins (d) and Hale; (e) and in *The King v. Wilkes*, (g) Lord MANSFIELD says, "Flight is itself a crime. If an innocent man flies for treason or felony, he forfeits all his goods and chattels." The reason given is, "because the party declines and refuses the trial by the law." *Hales v. Petit*. (h) But the perfect resemblance between grand and petty larceny in all respects except the amount of the punishment is clearly settled by the case of *Pendock v. Mackinder*, (i) where the question arose whether a person convicted of petty larceny could be a witness to a will. Lord Chief Justice WILLES, in delivering the judgment of the Court, there distinguishes between the crime and the punishment. He refers to Coke, to Hale, and Hawkins, to show that

* persons convicted of felony are infamous, and cannot * 486
be jurors or witnesses: he then cites the authorities to show that petty larceny is felony, and holds that the party convicted of that offence is not competent as a witness.

If the offences are in other respects the same, they must be so for the purposes of challenge; and they must especially be so after the 4 Geo. 1, c. 11, which subjects grand and petty larceny to the same actual punishment. Indeed, the incidents of the two offences are throughout the same. The

(a) Hetley, p. 68. See also *Male v. Ket*, Hob. 184, where the point was expressly decided. "Male brought an action against Ket for saying that he had stolen his corn out of his barn. After a verdict it was said the corn might not be worth a penny: yet judgment was given for the plaintiff; for it is felony, though it be not capital."

(b) Bk. ii., c. 89, § 1.

(c) 4 Comm. 355.

(d) Bk. ii., c. 49, § 14.

(e) 1 Hale, P. C. 580.

(g) 4 Burr. 2549.

(h) Plowd. 263.

(i) Willes, 665.

defendant may in any felony plead over after special plea; for though Lord HALE (*a*) states that he may do so *in favorem vitæ*, that restriction has not been recognized in practice; and in *Rex v. Goddard*, (*b*) Lord HOLT states the rule as existing in cases of felony, and not in misdemeanour; showing that in his opinion it belongs to felony as a class of crime, as contradistinguished from misdemeanours. Again, though in *Hawkins* (*c*) it is said, "in cases not capital, judgment on demurrer is final," yet in *Rex v. Purchas*, (*d*) where the indictment was for embezzlement, Mr. Justice PATTESON says, "I think that there is no doubt that the prisoner may plead over to the felony, if the demurrer be decided against him." In the case of *The King v. St. George*, (*e*) there was an indictment under the same sections of the same Act as that on which the present indictment was founded, viz., 1 Vict. c. 85; and on application to Mr. Baron PARKE to allow the prisoner to sit near his counsel, to which application the prosecutor consented, Mr. Baron PARKE said, "In a case of felony

* 437 the party * must be tried at the bar; in misdemeanour it is otherwise;" and refused the application. So, by the 22 Hen. 8, c. 14, § 5, any person arraigned for any petty treason, murder, or felony, is to plead and be tried without further respite and delay; and by 6 Geo. 4, c. 50, § 30, a special jury is allowed in criminal cases, except those of treason or felony. No distinction is there taken as to any classification of felonies, but the Act extends to every species of that offence. The reason for the rule is thus stated by Lord Chief Justice PARKER, in *The King v. Macartney*: (*g*) "There cannot be a special jury in cases of treason or felony, for the party must have the advantage of challenging twenty without cause shown." As that statute merely regulated the administration of the old law, this observation of the Lord Chief Baron shows that sect. 29, which enacts that no person arraigned for murder or felony shall be admitted to any peremptory challenge above twenty, must apply to every case in

(*a*) 2 Hale, P. C. 255.(*b*) 2 Ld. Raym. 922.(*c*) Pleas of the Crown, Bk. ii., c. 81, § 7.(*d*) 1 Car. & M. 619.(*e*) 9 C. & P. 485.(*g*) Vin. Abr. Trial, D. e. 2, oct. edit. 21 vol. 301.

which the party could not have a special jury ; for sect. 30 includes every case not within the preceding section.

In clergyable felonies the right of peremptory challenge existed. The benefit of clergy was at first a purely ecclesiastical privilege, and as such could be claimed even at the gallows. Hale. (a) It was afterwards granted to all who could read. *Searle v. Williams*. (b) The 18th Eliz. c. 7, which abolished canonical purgation, enabled the Judge to imprison for a year. Lord HOBART says (p. 292), "The statute, by taking away purgation, never meant to abate or abridge the benefit of clergy, but to give it by the * proper means and in the proper place, and by a more * 438 ready and direct means, without circuit or delay."

The benefit of clergy was a personal privilege ; peers had it. Blackstone. (c) The Statute 5 Anne, c. 6, extended the privilege, by not requiring the party to read. But though the punishment was thus in effect altered, a clergyable felony remains in quality a capital offence. It is so in theory, even where a statute creates a felony, and makes it punishable with transportation. *The King v. Johnson*. (d) This privilege can only be taken away by express words : thus Hawkins say, (e) "If a statute create a felony, and say that the offender shall suffer death, yet he shall in such case have the benefit of clergy ; for this being a privilege allowed by the common law, cannot be taken away without express words ;" and Hale (g) is to the same effect. The Statutes 7 & 8 Geo. 4, cc. 28, 29, 30, altered much of the criminal law. The first of these statutes (sect. 6) abolishes benefit of clergy ; but sect. 7 counteracts the effect of that abolition, by providing that persons convicted of felony, not excluded from clergy at the time of the passing of that statute, shall not suffer death.

The actual punishment of offenders convicted of clergyable felonies is, in many instances, increased by that statute ; as, for example, manslaughter, which is now a transportable

(a) 2 Hale, P. C. 321, 379.

(b) Hob. 288.

(c) 4 Bl. Com. 307, and see n. 2, by Coleridge.

(d) 3 M. & Sel. 539.

(e) Hawk. P. C. Bk. i., c. 7, § 9.

(g) 2 Hale, P. C. 320.

offence. The right to peremptory challenge in manslaughter existed under the Statute of Elizabeth, when the punishment was only one year's imprisonment. As to larceny, the 7 & 8 Geo. 4, c. 29, abolishes the distinction between grand and petty larceny, and provides that petty larceny * 439 * shall be of the same nature, and subject to all the incidents in all respects, as grand larceny was before the passing of this Act. The analogous Acts for Ireland are 9 Geo. 4, cc. 53, 54, 55, 56: and the Irish practice, which is said to have existed before these Acts, is plainly against law.

The spirit of the law is more favourable to defendants now than it was formerly. A defendant has his privileges extended, not abridged. In the case of *The King v. Geach*, (a) which was an indictment for forgery not punishable with death, Mr. Baron PARKE allowed a peremptory challenge. The practice in the English Courts is correct; that of the Irish Courts is in this respect erroneous. The rule of the common law attached on the offence, and did not vary with the extent of the punishment. Even if that rule was doubtful in itself, the settled practice of the English Courts has construed it; and if that rule is to be narrowed by the reason suggested, then it is submitted that the statute legally construed, if it does not confer, does not take away the right in this case.

The Attorney-General for Ireland (*Mr. T. B. C. Smith*), and *Mr. Waddington*, for the Crown. — The judgment of the Court below must be affirmed. The English practice is not warranted by law; the Irish practice is in accordance with all the authorities. The 10 & 11 Chas. 1, c. 9, was not a statute creating a right in favour of the subject, but limiting the right which he already enjoyed at common law; such is its very title; namely, "An Act for the limiting of Peremptory Challenges, in Cases of Treason and Felonies."

* 440 But even the common-law right of peremptory * challenge was not as extensive as it has been supposed on

(a) 9 C. & P. 499.

the other side: it was not a necessary incident to all kinds of felony. Though petty larceny might be a felony at common law, the right did not exist with reference to that crime. The argument of analogy attempted to be founded on the mention by Lord COKE of the offence of misprision of treason cannot be supported; for that offence was originally capital, and while so the right to peremptory challenge existed in it; but when it was declared a misdemeanour, that right ceased. All the text-writers say that the right of peremptory challenge was given in favour of life. Fortescue, (a) Lord COKE's Institutes, (b) Trials per Pais, (c) Hawkins's Pleas of the Crown, (d) Bacon's Abridgment, (e) Staundforde, (g) Lambard's Eirenarcha, (h) Hale's Pleas of the Crown, (i) Doctor and Student, (k) Wingate's Maxims, (l) Termes de la Ley. (m) If, in the time of Coke, Fortescue, and Lambard, the right of peremptory challenge existed in cases of petty larceny, they must have mentioned it. They do not mention any thing of the kind; but wherever they speak of the privilege, they speak of it as granted in favour of life.

The authorities, therefore, do not bear out the argument that petty larceny was in all respects a felony; for though, in Lord COKE, (n) larceny is put under the word felony, and the definition given of felony, that "*Ex vi termini*," it signifies "*quodlibet * capitale crimen felleo animo perpetratum*," may appear to apply to larceny, yet all the incidents of felony do not apply to it. Lambard's Eirenarcha proves the distinction here taken as to the difference in the punishment to be that which, in his opinion, was of great importance. He says: (o) "And albeit petty be not punishable by death, as the greater larceny is, yet be they both felonious takings." But further, in petty larceny benefit of

(a) De Laud. c. 27.

(b) 1 Inst. 156 b.; 3 Inst. 210.

(c) Vol. 2, 8th edit. 176, 599.

(d) Bk. ii., c. 43, § 5.

(e) Tit. Jury, E. 9.

(g) Pleas of the Crown, 157 b.; tit. Challenge, B. 3, c. 7.

(h) Page 554.

(i) Bk. ii., p. 267.

(k) Dial. I., c. 8.

(l) Page 358.

(m) Tit. Challenge.

(n) 1 Inst. 391 a.

(o) Page 272, c. 7, Bk. ii.

clergy could not be prayed ; (a) it did not produce civil death in the offender. (b)

[THE LORD CHANCELLOR. — In the later editions of this Year Book, the Judge is made to assert that petty larceny is not a felony. Lord Chief Justice GIBBS used to say that he could get authorities in the Year Books for any side in any thing.]

Nor did it admit of there being an accessory, “which,” says Lord COKE, “is owing to the tenuity of the offence.” (c)

In the case of the prisoner in petty larceny challenging more than three full juries, he was not subjected to the *peine forte et dure*, which was applied only in capital cases. Hale, (d) Lord COKE, (e) Staundforde, (g) Hawkins, (h) Blackstone’s Commentaries. (i) All these things show that, though nominally a felony, there was a great distinction between petty larceny and felonies in the strict sense of the word. These incidents thus excluded from petty larceny did extend to capital cases, though such cases were not felonies. Piracy is an instance of this kind. Piracy is not a felony, though it was a capital offence, and a pardon of all

* 442 felonies did not extend to it. Lord * COKE. (k) The 7 & 8 Geo. 4, c. 23, recognizes this distinction, when it speaks of peremptory challenges “in cases of treason, felony, or piracy ;” and this mode of speaking of the offence shows, first, that the offence was not a felony ; and next, that the right of peremptory challenge did not exist merely because the offence was in the class of felonies, but that it belonged, or was incident to, capital cases, and was allowed in favour of life. Another reason for insisting on this difference between the two classes of felonies, capital

(a) 4 Bl. Com. 365.

(b) 3 Inst. 213; Year Book, 27 Hen. p. 418.

(c) 12 Rep. 81.

(d) Pleas of the Crown, Bk. ii., p. 268.

(e) 2 Inst. 177.

(g) Bk. i., p. 24.

(h) Bk. ii., c. 43, § 9.

(i) Vol. 4, p. 825.

(k) 3 Inst. 111, 112.

and not capital, is that the benefit of clergy was only applicable to the former.

Then as to misprision of treason: that offence was at the common law punishable capitally, like high treason. Coke's Institutes. (a) The Statute 10 & 11 Chas. 1, c. 9, which limits the number of peremptory challenges, does not mention the offence of misprision of treason; and the reason is, that that offence had before then been made a misdemeanour by the 1 & 2 Phil. & M. c. 10.

A peremptory challenge was not allowed on the trial of collateral issues, because the life of the party was not there in jeopardy. It is true that Lord COKE says: (b) "If a man be outlawed for treason or felony at the suit of the King, though the issue be joined on a collateral point, yet he shall have his challenges; for this, by a mean, concerneth his life." Whether that passage is now authority or not, it shows that Lord COKE thought only of peremptory challenges in connection with the principle of favouring the life of the party. Mr. Hargrave says: (c) "Staundforde is of the same opinion, citing for * authorities Fitzherbert, &c. However, * 443 the benefit of peremptory challenges on collateral issues, in capital cases, has been denied by the practice of later times;" and he cites several authorities for this statement.

It may be admitted, that if the right existed at common law, the statutes have not expressly deprived the prisoner of it, and that he cannot be deprived of it by implication while the offence remains the same as at common law. But here the offence does not remain the same. The cases in the Irish Courts have always been opposed to the right now claimed. [The learned counsel referred to a great many cases collected in Mr. Joy's work on "Peremptory Challenges."] These decisions are justified by the change which the statute has made in the offence. The right, when it existed, was in favour of life; but when the statute took away the punishment of death, it took away the ground on which so great a privilege had been conceded to the prisoner.

(a) 3 Inst. c. 3; 4 Bl. Comm. 120; Staundf. Bk. I., c. 38.

(b) 1 Inst. 157 b.

(c) 1 Inst. 157 b, n. 8.

The offence here charged has now, by the change of the punishment, been placed in the same situation as a misdemeanour; the incidents of a misdemeanour alone apply to it. What they are may be seen in the case of *The King v. Taylor*. (a) There the defendant had pleaded, as in this case, a former conviction: there was a demurrer to his plea, and the demurrer concluded with a prayer of *respondeat ouster*; but the Court, after giving judgment for the Crown on the demurrer, held that that judgment must be final, and that the defendant could not plead over. Lord TENTERDEN, in giving judgment in that case, said that the defendant's plea was a plea in bar, and that the rule in civil actions was, that a de-

fendant could not plead a second plea in bar after a
 * 444 first had * been determined against him: his Lordship then added, "In this respect the analogy between actions and misdemeanours is established by express decision. In felonies the rule is otherwise: there, if he plead any plea that does not confess the felony, he shall plead over to the felony *in favorem vitæ*. . . . The reason of the rule is expressly mentioned by Lord HALE and all other writers in favour of life. It is well known that there is no felony at the common law, except petty larceny, in which judgment of death may not be given; nor any misdemeanour upon which such judgment can be given; and therefore the reason of the rule will not apply to the case of a misdemeanour."

[LORD CAMPBELL. — Suppose perjury was now made punishable with death, would the right of peremptory challenge thereby attach itself to the offence?]

It would, for the reason of the rule would exist there.

[LORD CAMPBELL. — Would that offence then become a felony?]

Not on account of the mere change of punishment. It is not contended here that the offence is a misdemeanour; but

(a) 3 B. & C. 502.

that, by the change of punishment, it has all the incidents of that class of offences, and cannot be treated like capital felonies, where particular privileges are accorded to prisoners "in favour of life." Here life is not in danger, and those privileges, therefore, do not exist.

Mr. Napier, in reply. — Piracy was always considered a felony, though it was not triable in the ordinary Courts of Common Law. The offence was always alleged as committed *piratice et felonice*. The argument drawn from the case of piracy does not, therefore, apply. But there was one offence which was a capital offence ; namely, that of heresy, and yet there was no right of peremptory challenge there ; a fact * which shows that the right did not exist on ac- * 445 count of the punishment. It is a right ascribable to the class of the offence, and not to the penalty affixed to the commission of it.

LORD CAMPBELL, in the absence of the Lord Chancellor, proposed, for the consideration of the Judges, the following question, which had been prepared by the Lord Chancellor before his Lordship left the House :

" A. B. being indicted under the Statute 1 Vict. c. 85, § 3, for the commission of the felony of shooting at another person with intent to murder, challenged peremptorily one of the jurors called to be sworn upon the trial : it was objected to by the prosecutor. Ought the Court to have allowed or disallowed such challenge ? "

The Judges requested and were allowed time to consider the question.

September 2.

The Judges attended this day ; and, differing in their answers, they delivered their opinions *seriatim*.

MR. JUSTICE WIGHTMAN. — The offence in ques-
tion is a felony, but the punishment is not capi-

Opinions of the
Judges.

[875]

tal; and it is to be considered whether the privilege of peremptory challenge depends upon the quality of the offence or the punishment.

It has been so invariably the practice in all the Courts of criminal judicature in England to allow a prisoner charged with any felony whatever, whether capital or otherwise, to challenge peremptorily any of the jurors called to be sworn, to the number of twenty, that the first impression upon the mind of any one accustomed to practice in those Courts * 446 would be, that * unless it clearly appeared that such practice was founded on error, its existence so long, without dispute or controversy, raises a strong presumption that its origin was legal and its continuance of right, and that the privilege is attached to the quality of the offence, and not to the punishment. It is said, however, that it is a privilege allowed only *in favorem vitæ*, and does not extend to cases in which the punishment is not capital. This position appears to be founded upon an observation made by some of the text-writers, as to the ground upon which a peremptory challenge is allowed to persons charged with treason or felony, that it is *in favorem vitæ*.

It is hardly necessary for the purpose of the present question to inquire critically into the etymology or original meaning of the term felony, but it is said by Sir William Blackstone (a) that the distinctive incident in felony is forfeiture, and not capital punishment; and that at common law there are offences which are felonies though not capital, and that there are offences, the punishment of which is capital though they are not felonies. He gives instances of these, to which it is not necessary to refer; but he further remarks that "the idea of felony is so generally connected with that of capital punishment, that we find it hard to separate them, and to this usage the interpretations of the law do now conform; and therefore if a statute makes any new offence felony, the law implies that it shall be punished with death, as well as with forfeiture." This passage tends to explain how it would happen that the privilege of peremptory chal-

(a) 4 Comm. p. 97.

lenge allowed in felony should be considered as originating *in favorem vitæ*; and accordingly we find in books of the highest authority that the privilege is stated to be incident to felony generally; and the *reason as- * 447 signed by some is, that such a privilege is *in favorem vitæ*.

It is said by Mr. Justice FOSTER, in his Discourse on Homicide, (*a*) that “at common law all felonies, except petty larceny, rape, and mayhem, were capital offences, unless in cases where the offender was capable of holy orders, and qualified for them;” and it may very well be that, felony generally being capital, the privilege was allowed generally to cases of felony, because the great majority were capital, though there were some few that were not.

In Finch’s Law of Trial by Jury, (*b*) it is said, “in indictments and appeals of felony, the defendant may challenge thirty-five jurors without showing cause; which is called a peremptory challenge.”

In Doctor and Student, it is said (*c*) that “he that is arraigned upon an indictment of felony shall be admitted, in favour of life, to challenge thirty-five jurors peremptorily.”

Lord COKE, (*d*) speaking of peremptory challenge, says, “This is so called, because he may challenge peremptorily upon his own dislike, without showing of any cause; and this only is in case of treason or felony, *in favorem vitæ*: and by the common law, the prisoner, on an indictment or appeal, might challenge thirty-five, which was under the number of three juries.”

In Comyns’s Digest (*e*) it is said, “So in petit treason or felony, by the common law he might challenge thirty-five.”

Each of the four eminent authorities I have cited, states the privilege of peremptory challenge as applicable to all cases of felony, without making any exception, *though the reason added by two of them does not * 448 apply to three or four of the common-law felonies. If

(*a*) Foster’s C. L. 305.

(*b*) Bk. 4, c. 36, p. 414.

(*c*) Page 29.

(*d*) 1 Inst. 156 b.

(*e*) Tit. Challenge, C.

the privilege did not extend to all felonies, it seems strange that no exception should be made by them.

The opinion that the privilege was incident to the quality of the offence, and not to the punishment,—though the severity of the latter as generally applicable to the offence may have been the first cause of it,—is supported by the fact of the privilege having always been exercised in cases where benefit of clergy might be claimed, and the felony was virtually and practically no longer capital. It may indeed be said, that down to the Statute 5 Anne, c. 6, the prisoner might not always be qualified to receive the benefit of clergy, as he might not be able to read; but by that statute, the necessity of reading to entitle a prisoner to the benefit of clergy was done away with, and any person from that time was entitled to the benefit of clergy in all clergyable felonies, merely for asking for it; and from that time those felonies practically and virtually were no longer capital; but the parties charged were still allowed their challenges as in other cases of felony, though there was no longer any danger of their lives in case of conviction.

Several statutes have at various times been passed apparently recognizing the privilege as incident to felony generally, and without reference to the punishment upon conviction. By the Statute 22 Hen. 8, c. 14, it was enacted, that “no person arraigned for any petit treason, murder, or *felony*,” should be admitted to any peremptory challenge above the number of twenty. By the Irish Statute 10 & 11 C. 1, c. 9, § 1, it was enacted, “that no person arraigned for any offence of high treason, petty treason, murder, manslaughter, or of
 * 449 any other felony whatsoever, shall be admitted to * challenge peremptorily above the number of twenty.” The 6 Geo. 4, c. 50, § 29, is to the same effect, that “no person arraigned for murder or felony shall be admitted to any peremptory challenge above the number of twenty.” And the Statute 9 Geo. 4, c. 54, § 9, contains a similar enactment for Ireland, and nearly in the same terms.

Upon the whole, it would seem that the origin of the privilege in felony may have been the capital punishment usually

incident to that quality of crime, but that the privilege was annexed to the quality of crime called felony, and continued so annexed in practice, in England at least, down to the time when the present question was raised, in all cases of felony, whether the punishment was capital or not; and that it has recognized as incident to felony generally, by the statutes to which I have referred.

I am therefore of opinion, that the Court ought to have allowed the challenge.

MR. JUSTICE COLTMAN. — It appears to me, on the best consideration which I can give to this very intricate and difficult question, that, by the common law of England, the right of peremptory challenge was given in all felonies except in the case of petty larceny, and that the reason why it was allowed was because the party's life was in jeopardy; but that there is no sufficient ground for saying that the right was given conditionally only, and to continue only so long as felony should continue to be a capital offence. There is no decision of any Court of Law in England, that the existence of the right is so limited. There is, indeed, a *dictum* of Lord C. J. NORTH, in *Reading's Case*, (a) which is supposed to * go to this extent. The indictment was for a misde- * 450 meanour, and the Chief Justice is reported to have said, "You cannot challenge peremptorily in this case, it not being for your life." Now, as far as the overruling of the challenge was concerned, this was a decision, and one that was quite unobjectionable: what is added seems to have been said, perhaps unnecessarily, by way of justifying the law from any imputation of hardship in disallowing peremptory challenges in misdemeanours, and not by way of laying down any general rule as to the cases in which peremptory challenges ought or ought not to be admitted. Even if this *dictum* had been stronger than it is, it would hardly be of more weight than what was said of an opposite nature by Chief Justice PARKER, in the case of *The King v. Macartney*, (b) which was an in-

(a) 7 How. St. Tr. 264.

(b) Vin. Abr. tit. Trial, D. a. 2, pl. 5.

dictment for murder, where, on a motion for a special jury, he said that there cannot be a special jury in treason or felony, for the party must have the advantage of challenging twenty without cause shown. This case is the more deserving of attention, inasmuch as a special jury is never granted in criminal cases except for misdemeanours only. (a)

If we turn to the text-writers of the greatest weight, we find them stating, in general, that the privilege was granted in favour of life. Lord COKE, (b) in speaking of peremptory challenges, says, "Peremptorie: This is so called because he may challenge peremptorily, upon his own dislike, without showing of any cause; and this only is in case of treason or felony, *in favorem vitæ*." Now it cannot, I think, be

* 451 inferred that, because the right was *granted *in favorem vitæ*, it must necessarily cease when the life ceased to be in jeopardy. It must, however, be observed, that some of the text-writers go further, and confine the right of peremptory challenge, in express terms, to capital cases: for instance, in the book called "Trials per Pais," c. 16, it is said that a peremptory challenge is not allowable but when the life of man comes in question. So in Wood's Institutes (c) it is said, "A peremptory challenge is not allowable but in case of life or death;" for which he quotes the above-cited passage from Co. Lit., which can hardly be said to go to the extent for which he cites it. There are other writers who lay the rule down without qualification. Finch (d) says, "In indictments and appeals of felony, the defendant may challenge thirty-five jurors;" and in Comyns's Digest (title Challenge) it is said, "In petit treason or felony, by the common law the prisoner might challenge thirty-five; which is now restrained by the Statute 22 Hen 8, to twenty.

That the doctrine laid down by some of these authorities; namely, that a peremptory challenge is never allowed except when life is at stake, cannot be true, appears to me to be proved by the circumstance of a peremptory challenge being allowed in misprision of treason down to the time of the 33d

(a) 1 Chitty, C. L. 522.

(c) Page 462.

(b) 1 Inst. 156 b.

(d) Bk. 4, p. 414.

of Hen. 8. By the Statute 33 Hen. 8, c. 23, § 3, it was enacted that peremptory challenge should not from thenceforth be allowed in any case of high treason or misprision of treason. Now, it seems to me to follow necessarily from this enactment, that a peremptory challenge was allowed in indictments for that offence; the punishment of which, though extremely severe, was not capital.

* It has been suggested that, at one time, misprision * 452 of treason was a capital offence; for it is said that Bracton considers concealment of treason as being treason; and Lord COKE says (*a*) that, by the common law, concealment of treason was treason, as it appears by *Lord Scrope's Case*. But the meaning of this is, I conceive, that an indictment for treason might be supported by a proof of concealment of treason, and in that case the ordinary sentence for treason would be passed; but if the milder course were adopted, of indicting for a misprision, in such case the sentence was not capital: and this view derives support from the Statute 1 & 2 Phil. & Mary, c. 10, § 8, by which it is declared and enacted, "that concealment or keeping secret of any high treason be deemed and taken only misprision of treason, and the offenders therein to forfeit and suffer as in cases of misprision of treason hath heretofore been used." These latter words evidently point to an ancient recognized mode of dealing with the offence of misprision of treason as distinct from treason, and which must have been then, as now, a misdemeanour.

As, however, the question I am considering arises upon very ancient matters of a technical nature, in which every step is liable to mistake, I should have little confidence in any opinion that might be formed if it were at variance with modern practice; and here we are met with the startling fact, that the practice of the Courts of law in England, and that of the Courts of Law in Ireland, are in direct opposition to each other; and I should have attributed the greatest weight to the Irish practice, if I did not find it to be at variance, as I conceive, with a principle of law which is firmly

(*a*) 3 Inst. 36.

*453 established. The practice * of the Irish Courts, I understand to have been, not to allow peremptory challenges in the case of clergyable felonies. This practice I conceive to have been erroneous, as the clergy might be counterpleaded, and the party executed, so that the charge ought to be considered as a capital charge. I am driven, then, to resort to the English practice, and I do not conceive that, with respect to that, any difference of opinion can arise. I believe it has always been the practice in this country, in all felonies above the degree of petty larceny, to allow peremptory challenges as a matter of right.

On these grounds my humble opinion is, that your Lordships' question should be answered in the affirmative : and I have the less reluctance in coming to this conclusion, because I think it clear that the Act of Parliament was not intended to abridge any right that prisoners possessed before it passed ; and as the right of peremptory challenge is little less important now than when all felonies were capital, it ought, in justice to prisoners, to be preserved to them.

MR. JUSTICE WILLIAMS. — In reply to the question proposed by your Lordships, I beg leave to give the same answer as my learned brethren who have preceded me.

In the first place, I believe it is admitted on all hands, that the prevalent usage (in this country, at least, and I know not whether your Lordships will notice any other) has been to allow a peremptory challenge, up to the prescribed number, in all cases of felony. Whether petty larceny be included (about which there may be some difference of opinion), as it does not seem to affect this question, it is not necessary to stop to inquire. No instance has been, and it is

*454 * believed that none can be, adduced wherein a distinction has been taken between felonies that are capital and those which are not. What degree of weight is due to this constant and undeviating course of practice, it is for your Lordships to decide ; to my apprehension, it is an ingredient in the case of very considerable importance. To attribute this prevalence to connivance or concession, or to any thing but right, seems to me a solution of a very unsat-

isfactory description. Why should an unauthorized indulgence, not founded upon any warrant or principle of law, have been conceded, if it could have been resisted, in this case in particular above all others? I should rather think it probable, that as a peremptory challenge may be for any reason wholly unknown, and therefore to a certain extent of a personal and offensive nature, it would have been resisted if resistance had been considered practicable. Without pressing this observation to an excessive and extravagant extent, or going so far as Lord C. J. WILMOT, who, in his judgment in *Wilkes's Case*, (a) does not hesitate to declare that "a course of precedents and judicial proceedings make the law," — it does, at least, constitute a presumptive case, which it is incumbent upon the party impugning it to do so upon clear and satisfactory grounds, before a departure is made from such a body of ancient and modern experience. That, therefore, is cast upon those who maintain that the challenge of the prisoner in this case was properly disallowed.

But to enter further into the case: The adverse argument appears to me mainly to rest upon the authority of text-writers (of great name and weight, undoubtedly), who so generally give as a reason * for allowing the peremp- * 455 tory challenge, that it is *in favorem vitæ*; from which it is of course inferred that, except where life is at stake, such challenge may not be allowed: because if it should be found that the expression *in favorem vitæ* is equivalent to and really means no more than that such challenge is allowable in treason and felony, and that, at the time when it was first used, it applied just as much to felony generally as to treason, and that the phrase has since been continued to express the principle upon which such challenges are allowable, — I must confess that the prevalent usage, with the legislative exposition, to which I shall presently refer, and upon which I very much found myself, does constitute a case which (but for the respect I have for the contrary opinion), I should have thought, admits of no doubt whatever.

The use of the expression *in favorem vitæ* may perhaps be

(a) Wilmot's Judg. & Opi. 330.

as well considered in the passage of Lord COKE where he treats of peremptory challenge, (a) as in any other; partly because that passage is directly referred to by Hawkins, (b) and partly because Lord COKE refers to Staundforde, Fortescue, and all the earlier authorities. Now, first it is observable that Lord COKE, though he speaks of *in favorem vitæ* as the reason for allowing the challenge, yet mentions felony generally of all kinds, treason only being named particularly. Hawkins, in the passage referred to, uses this language: "I take it to be agreed, that a peremptory challenge was allowable by the common law, in all capital cases, both upon indictments and appeals, and also in misprision of high treason." Hawkins, then, did not mean to lay down the general proposition that such challenge was allowed *in favorem*
 * 456 * *vitæ* or capital cases only; for he includes misprision of treason, which was not capital, and yet challenge, to a stipulated number, according to him, was allowed.

In Lord HALE's Pleas of the Crown (c) he does not refer to Lord COKE, or any of the ancient authorities before mentioned, but to Moore, 12, to warrant him in saying that the right of peremptory challenge, to any number under three whole juries, was *in favorem vitæ*; and in the case referred to there is nothing to warrant such conclusion; from which I infer that Lord HALE does not use the expression as if any peculiar weight or importance was attributable to it, but rather illustrating the principle upon which the challenge is allowed, indulgence to the prisoner, though circumstances might have been changed since the first adoption of it.

I shall lastly refer to Blackstone's Commentaries, (d) merely for the purpose of showing in what manner the subject is treated by one writer after another. "In criminal cases (he says), or at least in capital ones, there is, *in favorem vitæ*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all." He then breaks out, as his manner is, into an

(a) 1 Inst. 156.

(b) Bk. 2, c. 43.

(c) Vol. 2, p. 267.

(d) Vol. 4, p. 353.

eulogy upon the humanity of the English law, which will not allow a man to be tried by another whose countenance is not agreeable. It is obvious, however, that if this reason be good for any thing in a capital case, it must prevail, to a certain extent, in inferior cases ; it is a question of degree only, of more or less.

It is now proper to advert to the state of the law at the time when the expression *in favorem vitæ* first had * its origin, and from which it has been continued, * 457 from one writer to another, so late as the author last quoted. And it cannot be denied that all felonies (I purposely exclude petty larceny, for the reason already mentioned) were capital. To say, therefore, at that early time, that a peremptory challenge was allowed *in favorem vitæ*, and to say that it was allowed in felony generally, were expressions of precisely the same meaning. If it was a charge of felony, life was in question, and the allowance of challenge in such case was, strictly, *in favorem vitæ* ; but to infer that, because capital punishment in the case of any particular felony may have been taken away, and the challenge can therefore be no longer said to be *in favorem vitæ*, the right of challenge is for that reason lost, is contrary, as I think, to all sound reasoning, upon any legal principle or authority ; and yet that is what ought to be shown, to maintain the judgment below.

I come now to the consideration of some statutes which seem to me to have an important bearing upon this question. The first is the 22d Hen. 8, c. 14, the 6th section of which is in the following terms : “ And that no person arraigned for any petit treason, murder, or felony, be from henceforth admitted to any peremptory challenge above the number of twenty.” Now it is to be observed, that this is no incidental allusion to the subject, in a statute having other and different objects, but an express provision respecting this very subject of challenge, and making an important alteration therein. And as the language is “ treason, murder, or felony,” I cannot but consider this as a legislative recognition that in felony generally, without reference to capital or not, a peremptory challenge had been allowed before, and continued to

. be so, subject to the restriction as to twenty. The
 * 458 next statute is * the 33d Hen. 8, c. 23, § 4, by which
 it is enacted, “that peremptory challenge shall not
 from henceforth be admitted or allowed in any cases of high
 treason, nor misprision of high treason.” This, therefore,
 plainly shows, as was noticed in the passage cited from Haw-
 kins, that in a case, not a capital felony, nor even a felony
 at all, peremptory challenge was allowable. And, accord-
 ingly, the generality of the rule as to *in favorem vitæ* is
 clearly broken in upon, and its soundness thereby impeached.
 Lastly, as to the Statute 7 & 8 Geo. 4, c. 28, § 3, which pro-
 vides “that if any person indicted for any treason, felony, or
 piracy, shall challenge peremptorily” more than the number
 allowed by law, every such challenge shall be “entirely
 void.” Then comes section 6, whereby “benefit of clergy
 with respect to persons convicted of felony shall be abol-
 ished.” I shall not repeat the observations already made
 upon the Statute of Hen. 8, but merely observe that they
 seem to be precisely applicable to the 3d section of the latter
 Act. If it be contended that the question is impliedly af-
 fected by the 6th section, I confess my inability to do justice
 to that argument, and I must therefore pass it by, with the
 remark, that the direct inference which I draw from the lat-
 ter statute, taken altogether, is in favour of the right of
 challenge which was disallowed, and, upon the whole, I think
 improperly.

MR. BARON GURNEY. — I concur in opinion with the learned
 Judges who have preceded me, that the Court ought to have
 allowed the challenge in question.

There appears to have always existed a right of peremp-
 tory challenge in cases of felony; and undoubtedly it is
 stated by every writer on criminal law, one repeating
 * 459 the language of the other, that it was *in favorem*
vitæ. I think that there may be some question whether
 that was the ground upon which it was originally allowed, or
 whether it was a reason found out after it had been estab-
 lished. The ancient practice was to allow this to the extent
 of thirty-five, one short of three full juries; but by Statute

22 Hen. 8, c. 14, it was enacted, that no person arraigned for murder or felony should be admitted to any peremptory challenge above the number of twenty. I think the plain and necessary inference from that is, that in every case of felony a right to a peremptory challenge to the extent of twenty exists. And whatever the felony may have been, from that time there is no case in which the right to challenge peremptorily to that extent has not been allowed; and whatever alterations might be made respecting felony by subsequent statutes, unless this provision be altered, the right to challenge twenty must have continued to subsist.

But it is contended that, as at common law felony was punishable by death, and the relaxation of that has been by means of benefit of clergy, the right to challenge must necessarily be considered as limited to cases in which (unless clergy be pleaded) the punishment extends to death. I think that it is too much to say that that construction should be allowed to prevail; considering, first, the very partial, afterwards the more extended, and finally, the general application of benefit of clergy. In all cases where benefit of clergy was not excluded, the person accused really was not in peril of his life; and whenever the peril of life ceased, and the challenge was allowed to continue, that was a practical condemnation of the doctrine that the challenge was allowed only *in favorem vitæ*. The reason no longer applied, yet the practice of challenge existed.

During the whole of a long professional life I have * witnessed the constant exercise of the right of chal- * 460
lenge in all felonies, and no distinction ever made as to whether they were clergyable or not clergyable. Whether felonies at common law or felonies created by statute, if there was any legal proposition which was considered as undoubted by every professional man practising in Courts of criminal justice, it was, that every person accused of felony had the right of peremptory challenge to the number of twenty. It is very extraordinary that a contrary practice should have existed in Ireland, as we find that it has done, and that the difference of the practice has not attracted earlier attention.

It was not till the 7 & 8 Geo. 4, that benefit of clergy was abolished in England; and by the 9 Geo. 4, c. 54, that it was abolished in Ireland. But long before those statutes passed many felonies had been created by statute, some of which limited the punishment to transportation for seven years, and others to transportation for fourteen. There are expressions used by very learned Judges, that inasmuch as those offences were made felonies, the persons, if convicted, must pray benefit of clergy; but these *dicta* were foreign to the point upon which the Judges were called to decide; and I own that I cannot bring myself to think, where the punishment was limited to transportation, that under any circumstances judgment of death could have been pronounced. But if any doubt could exist before the statutes abolishing benefit of clergy, it does appear to me that after the Acts of Parliament which abolished it both in England and in Ireland, and made provision as to challenges, all difficulty is removed. The Statute 7 & 8 Geo. 4, c. 28, § 6, abolished benefit of clergy in

England; the Statute 9 Geo. 4, c. 54, abolished it in
 * 461 * Ireland; from that moment, therefore, all distinction between clergyable and non-clergyable felonies was gone. That statute then enacts that certain acts should be felonies, and should subject the parties committing them to certain punishments short of death; and it then goes on to enact, that as to all felonies, if a person shall challenge more than twenty, the excessive challenges shall be rejected, the jurors so challenged beyond the twenty shall be sworn upon the inquest, and the trial proceed. If there be meaning in language, it follows that all persons who shall in future be arraigned for felony, whether felony then existing or felony thereafter created, shall have a right to challenge twenty.

The offence of which this prisoner is accused is an offence created by the Statute of 1st Victoria. I think that it does not make any difference that it had been a felony before punishable by death: the statute which made it a felony, and so punished it, has been repealed; and this offence is a felony created by a statute which passed after the law which gave the person accused of felony the right of peremptory chal-

lenge ; it found him clothed with that right, and he cannot be deprived of it.

MR. JUSTICE PATTESON. — The question proposed by your Lordships necessarily involves some inquiry into the origin of peremptory challenges of jurors, and the reason why they were allowed ; yet I think at last that the answer will depend rather on a consideration of the meaning and effect of the Statute 9 Geo. 4, c. 54, relating to Ireland, and having the same provisions as Statute 7 & 8 Geo. 4, c. 28, § 6, relating to England, than on any thing else.

At common law undoubtedly thirty-five peremptory * challenges were allowed to the prisoner, in cases of * 462 treason, murder, and felony. It is stated in books of authority that this was *in favorem vitæ* ; it is so laid down in Staundforde (a) in express terms ; also by Lord HALE, in his Pleas of the Crown, (b) citing Moore, 12, in which case, however, nothing is said as to its being *in favorem vitæ*. Some doubt is made as to this matter in other books, but for the purpose of this argument it may be assumed that the allowance was *in favorem vitæ*.

Now at common law all felonies (whether including petty larceny or not is not material to the present purpose) were capital. The rule, therefore, as to challenges applied to all felonies. The extension of the privilege of clergy to all persons, whereby practically many felonies were rendered not capital, made no difference. It is said that the reason of this was, because it could not be told, until after a man was found guilty, whether he would pray the benefit of clergy, or if he did, whether it would be allowed, and therefore that all felonies continued capital at the time of arraignment. And this is true subsequent to the time of Hen. 6, but not before ; for previous to that time the party pleaded that he was a clerk first, and that was tried before the charge of felony, (c) and it was found inconvenient in several respects, one being, that thereby the party lost his challenges. This reason leads me

(a) Pleas of the Crown, Bk. ii., c. 43, p. 126 A.

(b) Vol. 2, p. 268.

(c) 2 Hale's P. C. 378.

to notice here, that peremptory challenges were always refused upon collateral issues; but that practice does not appear to me to affect the present question, because the reason was, not only that the life of the party was not involved in the collateral issue, but that the guilt or innocence of the
 * 463 * party was not involved; and therefore the challenges would be refused on such issue, whether they were granted on the issue of not guilty *in favorem vitæ*, or otherwise.

It appears, therefore, that in England, until the Statute 22 Hen. 8, c. 14, and in Ireland, until 10 & 11 Chas. 1, c. 9, the law was, that every prisoner in cases of treason, petit treason, murder, and felony (whether clergyable or not), had thirty-five peremptory challenges. The latter statute enacted, "that no person arraigned for high treason, petit treason, murder, manslaughter, or any other felony whatsoever, be admitted to challenge peremptorily above the number of twenty." The enactment in the English Statute 22 Hen. 8, c. 14, was in nearly the same words, and by 33 Hen. 8, c. 3, that enactment was made perpetual. In the same year the Statute 33 Hen. 8, c. 23, was passed, by which peremptory challenges were taken away in cases of treason and misprision of treason, which latter offence was never capital; and that circumstance furnishes another argument against the refusal of the challenges on the indictment supposed by your Lordships.

But to return to the Statutes 22 Hen. 8, c. 14, and 10 & 11 Chas. 1, c. 9, it appears to me that those statutes are legislative recognitions of the right of peremptory challenge in all cases of felony. I do not say that they gave the right *de novo*, nor extended it, but the legislature must be supposed to have known the course of practice in the Courts; and if, as is not disputed, peremptory challenges were allowed at the time of the passing of those Acts in all felonies, whether clergyable or not, surely those statutes recognize such practice as law.

There is no doubt that the allowance of peremptory
 * 464 * challenges has been uniformly prevalent in all felonies until the 9th Geo. 4, c. 54 (Irish). Clergyable felonies were, during all that time, practically not capital, though

indirectly, and yet peremptory challenges were allowed in them. Mr. Justice BURTON, indeed, states, in his judgment in this case, that they were refused ever since the year 1794, in all cases where capital punishment would not be involved, and that would carry the refusal back to a period before the abolition of benefit of clergy. But with all deference, I think that learned Judge must be mistaken in his recollection; for I cannot find any allusion to such a change in the practice anywhere else, nor can I see by what authority the Courts could have made the change, at any rate whilst felonies continued capital in theory, though not in practice. No instance can be found of any person being executed for a clergyable felony; none in which a person convicted of such felony had declined to pray the benefit of clergy, or been refused it. Then came the Statute 9 Geo. 4, c. 54, which took away clergy, and enacted, that felonies should be punished according to the terms of the law respecting each, and none should be capital but those which were expressly so declared, or excluded from benefit of clergy under the existing law. The very same statute, section 9, repeated the limitation of peremptory challenges to twenty, enacting, "that no person arraigned for treason or murder, or for other felony, shall be admitted to any peremptory challenge above the number of twenty." The words are "other felony," not "other capital felony;" and yet it is supposed that these words are to be so limited, the number of capital felonies having been most materially reduced at that time.

The contention on the part of the Crown seems, * therefore, to be, that this Statute (9 Geo. 4, c. 54) has * 465 taken away the punishment of death directly in cases where it was before taken away indirectly, but really with quite as much certainty and uniformity, so that the situation of a prisoner as to jeopardy of life is in no respect practically altered; yet the statute is to be construed so as by implication, and by implication only, to deprive the prisoner of the valuable privilege of peremptory challenges, which had been enjoyed by prisoners really similarly situated for several hundred years. Such an implication ought surely to be strictly

necessary; whereas here it is, in my opinion, not only not necessary, but in violation of the obvious intention, and even of the very words of the legislature in the ninth section of the Act. If this implication is to prevail, it ought to extend to every other distinction which has been established *in favorem vitæ*, and the judgment of *respondeat ouster* upon the plea of abatement, which is found on this very record, is wrong, and ought to have been an absolute judgment of transportation; for the distinction, in this respect, between felonies and misdemeanours had its origin just as much *in favorem vitæ* as peremptory challenges had.

The language of 7 & 8 Geo. 4, c. 28, as to England, is nearly the same as that of 9 Geo. 4, c. 54, and since that statute prisoners have been allowed to challenge peremptorily in cases of felony not capital, as before; but as the point has never been discussed, I lay no great stress on that practice. The practice in Ireland appears to have been different, and there are decisions of very eminent Judges against the allowing such challenges, before the present case arose. Those decisions are entitled to great consideration, and should not
 * 466 lightly be overruled; but I do not feel them * to be of so stringent a force as to prevent me from freely inquiring into the soundness of them, in answering the question proposed by your Lordships, especially as the same common law is in force in both countries, and the statutes which have been passed *in pari materia*, as to each country, ought to have the same construction.

My answer is, that in my opinion, in the case put by your Lordships, the peremptory challenge ought to be allowed.

MR. BARON PARKE.—It is with regret that I find that I differ from my brethren on the question proposed by your Lordships; but having fully considered the able arguments at the bar, and the judgments of the several Judges of the Court of Queen's Bench in Ireland, and concurring with the majority of those Judges in their opinion, I think I ought to advise your Lordships in conformity with that opinion.

The question is, whether on an indictment for a felony,

newly created since the abolition of the benefit of clergy not capital, the prisoner is entitled to his peremptory challenge of jurymen.

This question seems to me to be simply, What is the rule of the common law upon the right of defendants to peremptory challenge? Is it, that it belongs to all felonies, as incident thereto? or is it that it belongs to all capital offences only? Both sides, I believe, agree that the reason why this privilege was given to felonies was because life was in danger; but it is said by the plaintiff in error, that being given to felonies, *eo nomine*, it becomes an incident to felonies generally, and continues, although the reason has ceased. The Crown, on the other hand, contends that the rule and the reason were coextensive, and that it was given * only to * 467 capital felonies because they were capital, and for protection of life.

I have said that this question is one purely of common law, for it seems to me to be clear that it is not given by any statute. It certainly is not given by express words; and I do not think that the statutes on this subject contain any words which can be construed as meaning to give it. The 9 Geo. 4, c. 54, upon which the existing right of challenge in Ireland depends, contains negative words only; it does not say affirmatively, that in felonies there shall be such a right, it limits that which had existed before; it provides "that *no* person arraigned for treason or for other felony shall be admitted to any peremptory challenge beyond the number of twenty." The Irish Act 10 & 11 Chas. 1, c. 9, which had been repealed by 9 Geo. 4, c. 53, and which the 54th chapter re-enacts, is also in negative terms, and does not add to or enlarge the right of peremptory challenge. It leaves the right in all the felonies in which it existed before, but reduces the number of jurors with respect to whom it may be exercised, from thirty-five to twenty.

These statutes, therefore, leave the question as it was before, a question of common law, and are of no weight, except so far as they may be used as evidence of what the common law was, to be inferred from the understanding of Parliament. For it may be said, that if the legislature had under-

stood the privilege to be confined to capital felonies, it would have so stated, more especially after the recent passing of the Act 9 Geo. 4, c. 53, by which so many felonies were rendered no longer capital; and that it may fairly, therefore, be assumed that it was thought by the legislature that such privilege already belonged to all felonies, otherwise a
 * 468 provision would have been made for continuing * it.

And it certainly may be very reasonably conjectured, either that the probable opinion of the framers of these Acts was that there was a right in all cases of felony, whether capital or not, or that they did not mean to take it away by abolishing the benefit of clergy. If the former supposition be correct, it is some, but not the most satisfactory, evidence of the *communis opinio*, one of the sources from which we derive our knowledge of the common law: if the latter, it has no bearing on the present question; for though the legislature may not have intended to take away the privilege, it certainly has done so, if there was no privilege at common law except in capital felonies, because it has rendered them no longer capital.

We have, therefore, to determine what the common law upon this subject is, by the light of those authorities from which we usually derive the knowledge of it; the decisions of Courts, the *dicta* of Judges, the authority of text-writers, analogies from admitted rules, and the prevailing opinion and practice.

First, the only decisions of Courts are those which have taken place in Ireland. In three cases, if not more, individual Judges have decided, and we learn from the late Chief Justice BUSHE that one of the decisions was with the concurrent advice of the twelve Judges of Ireland; (a) and all these decisions are in favour of the Crown, and have been constantly acted upon. There is none in any Court in Ireland to the contrary, nor in England, in any case in which the point has been taken; and this appears to me to be a matter of the greatest weight and consequence. And the authority of these and all decisions ought to bind us, un-

(a) The Queen v. Gray, Dix's Rep. 288.

less they are plainly founded in error; and * what- * 469
ever may be said as to the degree of certainty with
which the law may be collected from the other authorities, it
is impossible, I think, to say that those authorities are so
clear as to show that they are founded in error. Add to this,
the practice in Ireland has been a long time established to dis-
allow peremptory challenges except in capital cases, though
there is a circumstance which may somewhat weaken the
value of this practice as evidence of the common law; namely,
that it appears, particularly from the statement of the emi-
nent Judge, Mr. Justice BURTON, to have prevailed long before
the abolition of the benefit of clergy, and was, therefore, in
respect to offences entitled to clergy, erroneous; for there is
no doubt that all such felonies were, strictly speaking, capital,
unless clergy was prayed, and in point of law, at the time the
jury were sworn and the challenge made, were punishable
with death. The practice, however, does still strongly show
the prevailing opinion that the privilege did not belong to all
felonies, and was confined to those which were capital, though
it went too far in dealing with clergyable felonies as not being
capital. They were not so substantially and in effect, but in
form they were, and there can be no doubt that the accused
was entitled in them to his peremptory challenges.

On the other hand, the English practice has undoubtedly
been to allow the right of peremptory challenge in all felonies
since the 7 & 8 Geo. 4, the same as was done before; but the
effect of this, as evidence of the common law, is greatly im-
paired, if not altogether destroyed, by two circumstances. In
the first place, the objection has never been taken on the part
of the prosecution, which in general in this country is
conducted by private individuals, not by a * public * 470
officer; and there is less occasion for insisting on the
strict right, as in the common and ordinary course there is a
full attendance of independent jurors, in whom both sides
may repose confidence. A second circumstance is, that the
practice prevails equally, so far as my experience goes, in mis-
demeanours, and in all civil cases; no one ever having heard
of any impediment being interposed to the defendant or plain-
tiff in actions, in modern times, objecting to any number of

jurymen without cause, and they are always withdrawn ; yet in actions there is unquestionably no right of peremptory challenge.

It is properly observed by Mr. Justice CRAMPTON, in the report of this case, that there is considerable evidence that the English practice is founded on concession, not right ; and that the Court ought to distinguish between a practice which is the result of strict right and founded upon legal principles, and a practice which is a mere matter of indulgence and concession, growing out of that spirit of candour and fair dealing, and tenderness for persons undergoing the ordeal of public trial, by which the conduct of criminal trials in England is eminently characterized, as well on the side of the prosecution as of the defence : but the same very learned Judge adds, that the rights of the prosecutor and the prisoner have been more jealously and rigidly watched in Ireland ; and the Irish practice, therefore, he properly says, affords a better test of the exact limits of the prisoner's right of peremptory challenge than the English practice does.

Whilst on this part of the case, I wish shortly to notice that case which was tried before me at Monmouth.

* 471 *The King v. Geach*, (a) which has been cited * as an authority for allowing the peremptory challenge in a non-capital felony. It cannot be considered as any authority whatever ; it was only an instance of the practice to which I have adverted ; for unquestionably the point was never taken nor considered by me ; the matter passed as one of ordinary course.

The decisions, therefore, being all one way, and the practice such as I have stated, there remain to be considered the *dicta* of Judges, the authority of text-writers on this subject, and the other sources from which we obtain the knowledge of the common law. Many of those text-writers, the more modern particularly, only repeat those who preceded them, and the more correct notion of the common law will be obtained from the older. One of the earliest traces of this right is in the Year Book, 9 Hen. 5, p. 7. In appeal of murder it

(a) 9 C. & P. 499.

was argued, apparently by counsel, that the defendant should have his peremptory challenge of one who had already been sworn on the jury, which had been adjourned for want of jurors; the ground is "that his life was in jeopardy," which shows what the principle was on which the right proceeded. The claim was disallowed there. It seems to have been allowed in 32 Hen. 6, c. 26, *in favorem vitæ*. Fortescue says, (a) "*In favour of life*, the accused may challenge thirty-five, and this peremptorily; who then in England can be put to death unjustly for any crime?" Staundforde, who writes in the early part of the reign of Elizabeth, states, (b) "There is in felony a challenge to be allowed *in favorem vitæ*;" and the same author, in the same treatise, states petty larceny to be no felony, and consequently the right seems by him to be confined to capital felonies. Lambard, in his *Eirenarcha*, (c) written in James the *First's time, * 472 puts it generally, as allowed in favour of life. Lord COKE (d) says, that peremptory challenge is in treason or felony, *in favorem vitæ*.

But the text-writers not merely say that it is given *in favorem vitæ*, but that it is only allowed on issues which directly affect life; viz., not guilty to the treason or felony. Staundforde, in p. 158, says, "Nota, que cest peremptorie challenge nest destre prise (comme semble), mes ou le vie le prisoner est in jeopardie sur le trial." So where misnomer is pleaded, or other collateral issue, it is not allowed; and this "*comme semble*" does not imply any doubt as to peremptory challenge applying only to cases where life is in danger, but as to its application to collateral issues. It is observed in a note of Mr. Hargrave's *Co. Litt.*, (e) that Staundforde himself thought there was a privilege of challenge peremptory on collateral issues; (g) but on referring to the passage in Staundforde, it may be doubted whether he means more than that in outlawry, the outlaw may challenge for cause; as he gives as a reason, that although he cannot challenge any one *worse* than himself, being an outlaw, yet as that is the issue

(a) De Laud. L. A. c. 27.

(c) Bl. 4, c. 14, p. 554.

(e) 157 b, note 8.

(b) Page 157 b.

(d) 1 Inst. 156 b.

(g) Staundf. 163 a.

to try, whether he is an outlaw or not, such an opinion of him ought to be suspended until he is tried. Lord COKE (*a*) is to the contrary, because the collateral issue “by a mean *concerneth* his life;” but this point is set at rest by a judicial decision in *Rex v. Okey and Others*, (*b*) and by *Johnson’s* and *Ratcliffe’s Cases*. (*c*)

This point being so determined, I cannot help thinking that it is a very strong authority to show what the rule of the common law is; and that the right of peremp-
 * 473 tory * challenge belongs only to that class of charges in which life is in jeopardy. In a book, written by Lord Chief Baron BOLTON, afterwards Lord Chancellor of Ireland, called, “The Justice of the Peace for Ireland,” published about 1638, cited in Mr. Joy’s very learned book on peremptory challenge, in which all the authorities are collected, it is said generally, “the common law hath, in favour of life, allowed unto the prisoner his peremptory challenge.” In Wingate’s Maxims at Common Law, upon an indictment or appeal of treason or felony, the prisoner might, *in favorem vitæ*, challenge peremptorily thirty-five. Sir JOHN HAWLES (in his Observation on Lord Russell’s Trial), (*d*) says, “Generally it is a privilege given *in favorem vitæ*.” In “Trials per Pais,” (*e*) peremptory challenge is not allowed, except where life comes in question. On the other hand, Finch (*g*) lays it down generally, in indictments and appeals of felony.

I forbear to cite all the more modern text-writers, which only repeat the ancient authorities in somewhat different language. In some of these the right is said to belong to capital cases. (*h*) In others, as Wood’s Institutes, in one edition, 1720, upon an indictment or appeal of death; in another, 1724, p. 642, on an indictment of treason or felony, or appeal of death. Hawkins (*i*) says it is allowable in all capital cases, and also in misprision of treason. Blackstone (*k*) says it is allowed in criminal cases, at least capital ones.

(*a*) 1 Inst. 157 b.

(*c*) Foster’s C. L. 40 and 46.

(*e*) 455 (1725) ; 600 (1766).

(*h*) Bac. Abr. tit. Jury, E. 9.

(*k*) 4 Comm. 353.

(*b*) 1 Lev. 61.

(*d*) 9 St. Tr. 796.

(*g*) Page 414.

(*i*) Bk. 2, p. 43, § 5.

Comyns (a) says, in petty treason or felony, not limiting the privilege to capital felony ; but he is only citing Coke Littleton, 156 b, in which it is said to be *in favorem vitæ*.

* I cannot help thinking, if much weight is to be * 474 attached to the more modern authorities, the greater part of them, as well as the more ancient authorities, are in favour of limiting the right to capital cases. These are, then, the *dicta* of Judges: In *Reading's Case*, (b) Lord C. J. NORTH, in a case of misdemeanour, says, "you cannot challenge peremptorily, not being for your life;" and again, (c) "the challenge is only allowed in matters capital, in favour of life."

On the other hand, Chief Justice PARKER, in *Macartney's Case*, (d) says, "There cannot be a special jury in cases of treason or felony ; for the party must have the advantage of challenging twenty." That was, however, a case of trial for the murder of the Duke of Hamilton ; and the *dictum* may be reasonably construed as relating to a capital charge, and is not, therefore, of any weight.

Considerable light is also thrown upon the rule of the common law, by the ancient practice of granting a tales in capital cases ; it may be granted for a larger number than the first process, to prevent delays from peremptory challenges. (e) The defendant had forty tales, because, in appeal of murder, rape, or felony, where life is in jeopardy, there he shall have as many tales as he pleases, because he may challenge peremptorily thirty-five ; but in actions between party and party, it must always be under the first number. To the same effect is *Denbawd and Woodley's Case*. (g) Still more light could be thrown upon the question, indeed it would be thereby decided, if it could be established satisfactorily what the rule was in ancient times on the subject of petty larceny. * There is some contradiction in the books * 475 upon the question, whether this offence was a felony

(a) Dig. tit. Challenge, c. 1.

(b) 7 St. Trials, 265.

(c) 7 St. Trials, 266.

(d) 21 Vin. Abr. 301.

(e) Bac. Abr. tit. Juries, C.; Bro. Abr. tit. Tales, 8.

(g) 10 Rep. 104 b.

at common law, and some whether it was at any time punishable with death. These authorities are collected by Mr. Joy, in the treatise to which I have already referred. The result appears to be that it was a felony at common law, and not punishable with death. Was a peremptory challenge allowed in such a case, or not? There is no decision on that subject, one way or the other; and there are circumstances which lead to an inference both against that supposition, and in favour of the right of challenge.

There are two circumstances from which it may be inferred that no such right existed: first, that it appears to be clear that the consequence of challenging more than the legal number in case of felony, was, at common law, that of the *peine forte et dure*; but the *peine forte et dure* never was applicable to petty larceny. (a)

The second circumstance is, that Staundforde, who wrote soon after the Statute 32 Hen. 8 passed, states, 24 b, the challenge to be allowed in all felonies, *in favorem vitæ*, and treats petty larceny as no felony, says nothing of the right of challenge, and consequently it is inferred that it did not then exist in petty larceny.

On the other hand, *Mr. Napier*, in his able argument at the bar, very properly urged, that it may be inferred that the same rights belonged to both grand and petty larceny; because if a person is indicted for the greater, he may on the same indictment be found guilty of the lesser offence; as was decided in *Bromley's Case*. (b)

* 476 * To this it may be answered, that the course pursued was beneficial to the prisoner, who had his peremptory challenges upon this form of indictment; and therefore it was no wrong to him to find him guilty of the lesser felony, upon a charge in which he had none. But it must be admitted that the decision in this case does raise a doubt as to the right of peremptory challenge in petty larceny, as it is more correct to suppose that the Court considered the incidents as the same in all respects. The au-

(a) 2 Inst. 177; 2 Hale, P. C. 399; 2 Hawk. P. C. 320.

(b) Hetley, p. 66.

thorities, therefore, leave the question thenceforth as to petty larceny not perfectly clear.

It remains to consider another point which was made the subject of argument at your Lordships' bar. It was said that peremptory challenges were allowed in cases of misprision of treason at common law, and misprision was a misdemeanour only, not affecting life; and consequently that the privilege was not confined to cases affecting life.

If it were true that in misprision of treason at common law there was this right, it might be explained on the supposition that it was an offence of great magnitude, near akin to the highest known to the law, especially in olden times. This is the explanation given by the Judges in the Queen's Bench in Ireland; on that ground it might be treated as an exception to the general rule. But the authorities collected in the treatise to which I have referred render it extremely doubtful whether the privilege ever did belong to misprision of treason. There is no old text-writer who mentions that such a right is incident to it. Hawkins states (*a*) that he takes it to be agreed that a peremptory challenge was allowable at common law in all capital cases, and "also in * misprision of treason." The authority cited for the * 477 last position is Lord COKE, (*b*) who refers to Brooke's Abridgment, and who also refers to the Statute 23 Hen. 8, only. It is inferred that the statute would not have enacted that no peremptory challenge should thenceforth be admitted in treason, or misprision of treason, unless it was already admissible therein in the opinion of the legislature; and no doubt it is a reasonable, though not conclusive inference. It is remarkable, however, that no trace of such a right should be found in the older authorities; and if it had existed, it might have been expected that the Statute 1 & 2 Phil. & M. c. 10, would have restored the course of trial of misprision of treason, as well as of treason, to the rules of common law; which it certainly does not.

It is also very remarkable that the corresponding Irish Statute of 10 & 11 Chas. 1, c. 9, which limits peremptory

(*a*) 2 P. C. c. 43, § 5.

VOL. XI.

(*b*) 3 Inst. 27.

challenge in Ireland in cases of treason, does not mention misprision of treason; which affords a strong argument that in Ireland, at least, the right of challenge did not exist in cases of misprision of treason, or it certainly would have been limited.

It is said, however, that if it should be held that the right of challenge exists only in capital felonies at common law, the same rule would apply to pleading over in charges of felony, after pleading a special plea. This right is, according to Lord HALE, (a) *in favorem vitæ*; *Rex v. Taylor*; (b) and Lord HALE says, (c) he shall not lose his life for mispleading. I am quite prepared to say, that this consequence would follow, but it does not appear to me to weaken the force of the argument.

* 478 * Upon the whole, it appears to me that I ought to advise your Lordships that the right of peremptory challenge does not exist in non-capital felonies: because the statutes restricting the right of challenge (not giving it) contain negative words only, without any affirmative implication, and leave the common law as it stood; and the common law, upon the weight of authority, is, I think, this, that there is a right of challenge in all capital cases only. The framers of the Act, 9 Geo. 4, I have no doubt, never intended to take away the right, by abolishing the benefit of clergy. Their object was to do away with a fiction which they thought strange and inconvenient, and discreditable to the criminal law of the country; and they supposed that by removing it, the offences would be left precisely in the same condition, in all respects, as if the fiction had continued. The result, therefore, is one which they never contemplated, but it nevertheless is the result, if the position is correct that by the common law the right belongs only to capital cases; and then it can only be regretted, that the legislature, in removing a fiction which formed an important part of our old system of criminal law, and was closely interwoven with it, has not foreseen all the consequences, and taken care to avoid them by proper enactments. It is the duty of Judges, not to sup-

(a) 2 P. C. 33.

(b) 3 B. & C. 513.

(c) 1 P. C. 257.

ply the defects of the legislature by providing a remedy, but simply to construe the provisions of the statute it has enacted; and I cannot find words to give this privilege in the statute in question, if the effect of making the offence no longer capital was to take it away.

For these reasons, I humbly state my opinion that the question ought to be answered by saying, that the challenge should be disallowed.

* LORD CHIEF BARON POLLOCK. — In answer to the * 479 question proposed by your Lordships, I am of opinion that the Court ought to have allowed the peremptory challenge. I consider the late Statute, 9 Geo. 4, to have put the law in Ireland on the same footing as in England; and the question is, what was the state of the law in England at that time? In this country the right of challenge in such a case is regulated by the Statute 22 Hen. 8, c. 14, § 6, made perpetual by 32 Hen. 8, c. 3. By that statute it was enacted, that no person arraigned for any petit treason, murder, or felony, be thenceforth admitted to any peremptory challenge above the number of twenty. It is to be inferred from this (independent of any rule of the common law) that a person arraigned of felony may challenge peremptorily to the number of twenty. No doubt at the common law such challenges were allowed, but the right is here recognized, and without any reference to any limitation.

The text-writers have undoubtedly laid down as the reason of this indulgence, that it is *in favorem vitæ*; but there is a wide difference between the reason that may be assigned by a learned commentator, and a condition forming part of the law itself. I cannot find any authority for saying that it is a condition to the exercise of this right, that the life of the accused party must be in danger; and no practice is to be met with, no case can be cited, in which on this ground a peremptory challenge has ever been refused in this country. On the contrary, there has been a practice in this country for many years to allow such challenges.

It appears to me, on every rule of construction, that when capital punishment is taken away simply, * and * 480

a different punishment awarded by law, all the other incidents remain, all the privileges of the accused continue, not expressly taken away. The right of peremptory challenge is nowhere taken away expressly, and therefore remains. And I come to this conclusion with the more confidence, because as transportation for life (or at all) was a punishment unknown to the common law, I am quite unable to form any opinion in what light this punishment would have been regarded by those who framed the law by which peremptory challenges are in any case permitted.

LORD CHIEF JUSTICE TINDAL. — In answer to your Lordships' question, I would humbly state that the conclusion at which I have arrived, after hearing the argument at your Lordships' bar, is, that the Court below ought to have allowed the peremptory challenge on the part of the prisoner. And the reason of such conclusion is shortly this, that it is certain that A. B. would, by the common law, have been entitled to his peremptory challenge in the case supposed, if he had been arraigned upon the very same felony before the passing of the Statute 1 Vict. c. 85; but it is not equally certain that such peremptory challenge has been taken from him by the necessary operation of that statute. And if the question, whether his right to the peremptory challenge has or has not been taken away, remains open to any doubt, it appears to me, that in accordance with the general principle of decision applied to criminal cases, *tutius erratur in mitiori sensu*, the decision of such question is to be given in favour of the prisoner, who is not to be deprived, by implication of a right of so much importance to him, given by the
 * 481 common law, and enjoyed for * many centuries, unless such implication is absolutely necessary for the interpretation of the statute.¹ But I think further, for the reasons I am about to submit, that the question does not remain in doubt, but that the sounder inference to be drawn from the arguments and authorities which have been brought in review is, that the right claimed by the prisoner

¹ See *Levinger v. Reg.*, L. R. 3 Priv. C. Ap. 289.

has not been taken away by the alteration in the punishment for the offence, but still exists as before the passing of the Act.

It is undoubtedly true, that the ancient authorities, at least the far greater number of them, describe the right of peremptory challenge to be a right allowed *in favorem vitæ*. Such is the language of Staundforde, (a) of Lambard, (b) of Lord COKE, (c) of the Author of Doctor and Student, (d) of Fortescue, (e) of Lord HALE, (g) who adds, "because his life is now at stake;" although it is to be observed, in the authority cited by him, viz., Moore, 12, no mention is made of that reason; and many other writers of later date lay down the proposition in similar terms. Finch, however, (h) and many other text-writers, state the rule generally as applicable to the case of all indictments and appeals of felony, without any reference to the punishment annexed to that offence. But perhaps this apparent diversity is not of much real importance; for it is well known that at common law all felonies, certainly all but petty larceny, were followed by capital punishment; and as to petty larceny, the books differ whether it is felony or not; Staundforde (i) expressly affirming it not to be felony, * whilst Lord HALE (k) * 482 affirms that it is. It may perhaps be considered as felony *sub modo*, and in a qualified and restricted sense having some, though not all, the attributes and consequences of felony. But whether it be so or not, there has been no ancient authority cited to show that peremptory challenges were not allowed even on the trial for that offence; so that it may be safely laid down that at common law all felonies, properly so called, were capital, and that peremptory challenges were allowed on the trial of all such felonies; in other words, that the right to a peremptory challenge was in all cases an incident to a trial for felony.

The two propositions, therefore, that the peremptory chal-

(a) Pl. C. 158 a.

(c) 1 Inst. 156 b.

(e) De Laud. c. 27.

(h) Law, p. 414.

(k) 1 Hale's P. C. 530.

(b) Just. Peace, 546.

(d) Chap. 8.

(g) 2 Pl. C. 266.

(i) P. C. 24 b, 127 b.

lenge was allowed in all trials *in favorem vitæ*, and that it was allowed in all trials for felony, are, in substance, one and the same. It is equally true that the challenge was granted *in favorem vitæ*, and that it was an incident to felony. But the question still arises, whether the expression of the text-writers, "that it was granted *in favorem vitæ*," carries with it the force and meaning that it was incident to the trial for felony only so long as the punishment for felony continued to be capital, and no longer; that the words imported a limitation or condition upon which the right to such challenge is to depend; or whether the words import no more than a mere matter of description, by the ancient text-writers, of the probable cause and origin of this challenge; which if given in the case of felony, as a known class of criminal offence, must necessarily, as felony was then punishable, be given *in favorem vitæ*.

It would certainly be most unsafe to give to this expression of the text-writers the operative force contended * 483 * for on the part of the Crown, and to hold the consequence to follow, that because the capital punishment has been taken away by a subsequent statute, the offence still remaining a felony, the right to the challenge has been also abolished. The very same expression has been employed by the highest authority in another instance, in which to draw the same conclusion as is now contended for would be obviously wrong, it being manifest that the expression has been used by way of explanation or analogy only. In the *Cases of Appeals*, (a) "It was resolved by the Lord WRAY, Sir THOMAS GAWDY, CLENCH, and FENNER, Justices, that the reason of *autrefois acquit* was, because the maxim of the common law is that the life of a man shall not be twice put in jeopardy for one and the same offence; and that is the reason and cause that *autrefois* acquitted or convicted of the same offence, is a good plea;" and yet it is manifest this must be put by way of example only, for the rule, beyond all doubt, extends equally to misdemeanours as to capital cases. And after all, who is to say, that if the severe punishment

(a) 4 Rep. 45 a.

of transportation for life had been known to our ancestors, the same jealousy which existed *in favorem vitæ* would not have shown itself to the same extent in favour of the party charged, when liable to a punishment scarcely less severe?

Some other arguments have been urged at your Lordships' bar in support of the continuance of the right of peremptory challenge in all cases of felony. It is argued that the right could not have been originally confined to charges which involved the loss of life, as it was allowed in the case of misprision of treason. And it seems impossible to deny, upon any *legal ground of construction, that the * 484 Statute 33 Hen. 8, c. 23, which took away the peremptory challenge "in all cases of high treason and misprision of high treason," does by necessary implication admit that the offender had the right to the peremptory challenge in the case of misprision of high treason before the passing of that Act. The same rule is laid down in general terms by Hawkins, (a) without any distinction as to the description of misprision of treason, but treating it, as it was generally understood to be, as a misdemeanour only, and not as the subject of capital punishment.

Again, it was argued, and not without some weight, that the practice of the allowance of benefit of clergy afforded a strong inference that the right of peremptory challenge has not been for many centuries considered to be confined to felonies that were followed with capital punishment. The extension of the privilege of benefit of clergy by the Statute of 5 Anne to all persons indiscriminately — which privilege for many centuries before was claimable by a large portion of the community — had occasioned many felonies, practically speaking, though not strictly so, to become not capital. And such practice might have been reasonably expected to produce some alteration in the application of the law of peremptory challenge, if it was allowable only *in favorem vitæ*. But no alteration in the law took place; the allowance of the privilege continued the same. It was urged, in answer to this argument, that the reason for allowing the peremptory

(a) Pleas of the Crown, Bk. 2, c. 43, § 5.

challenge, notwithstanding the felony being clergyable, was, because it could not be told until after a man was found guilty whether he would pray the benefit of clergy, or
 * 485 if he * did, whether it would be allowed or not ; and that, consequently, all felonies continued capital at the time of the arraignment. But if this reason is correct, it can only be so subsequently to the time of Henry 6, upon the ground suggested by our brother PATTESON, which I will not therefore repeat.

The right to challenge peremptorily has been uniformly acted on, in England, both in felonies clergyable and not clergyable, without any distinction between them, down to the 7 & 8 Geo. 4, c. 28, English (9 Geo. 4, c. 54, Irish), which abolished the allowance of clergy. For many centuries prior to that time clergyable felonies were practically not capital, although theoretically they still continued to be so ; and yet peremptory challenges were allowed equally in both. No instance can be found of any execution for a felony in which the benefit of clergy could be claimed ; no instance in which a person convicted of such felony had declined to pray the benefit of it, or in which, where the offender was entitled to it, such benefit has been denied him. Where the offender has persisted in challenging a greater number than twenty in the case of a clergyable felony, the law was, that he subjected himself to the same punishment as if found guilty upon verdict or confession. Where statutes have been passed taking away the benefit of clergy, there is not unfrequently an express provision, that if the offender in case of felony “do challenge peremptorily above the number of twenty persons, he shall not have the benefit of clergy ;” such is the case in 4 & 5 Phil. & M. c. 4, — the law thus treating the right to challenge peremptorily, without any distinction, whether the felony be clergyable or not.

But without attributing too much weight to either
 * 486 * of the two arguments last adverted to, that which appears to afford the strongest ground for the conclusion that the right to the peremptory challenge still exists, is the inference to be drawn from the language and form of the Statutes 22 Hen. 8, c. 14 (made perpetual by the 32 Hen. 8,

c. 3), and 7 & 8 Geo. 4, c. 28, abolishing the benefit of clergy. Until the passing of the former Act, it was the settled rule of the common law, that wherever a peremptory challenge was allowed, the prisoner might challenge as many as he thought fit under the number of three full juries, that is, not amounting to more than thirty-five; and as it is enacted, by that statute, "that no person arraigned for any petit treason, murder, or felony, shall be admitted to any peremptory challenge above the number of twenty," this amounts to a legislative recognition, affirmatively, that the offender has the right to challenge to the number of twenty in all cases of petit treason, murder, or felony. Then follows the Statute 7 & 8 Geo. 4, c. 28, English (9 Geo. 4, c. 54, Irish), which by sec. 6 abolishes benefit of clergy, and by sec. 7 expressly enacts, "that no person convicted of felony shall suffer death, unless it be for some felony which was excluded from the benefit of clergy before the first day of the present session of Parliament, or which hath been or shall be made punishable with death by some statute passed after that day." And it appears scarcely conceivable, that when the legislature had introduced so sweeping an alteration in the consequences of felony, as in effect to render all felonies, within a very limited exception indeed, not capital, that the same statute should, in the same breath, enact (sec. 8), "that if any person indicted for any treason, felony, or piracy, shall challenge peremptorily a greater number of the * men returned * 487 to be of the jury than such person is entitled by law so to challenge, in every of the said cases every such peremptory challenge beyond the number allowed by law shall be entirely disregarded," — unless the legislature had intended this enactment to apply to felonies with their then present punishment as altered by that statute. This statute of Geo. 4 brings down the enactment of 22 Henry 8 to the time at which the statute itself is speaking; in effect it says that now, at the time of passing this Act, every person charged with the commission of any felony shall be entitled to challenge peremptorily to the number of twenty; and there appears no legal ground of construction upon which the general expression of "any felony," in the third section, can be held not to

comprise the felonies included in sec. 7, that is, felonies from which the benefit of clergy has been taken away. The distinction between felonies capital and not capital was then for the first time created; and it would not be too much to presume, that if the legislature had intended that the privilege formerly belonging to all felonies should thenceforth be restrained to capital felonies only, it would have used the expression of "any capital felony," instead of the general expression of "any felony."

The ground upon which the argument on the part of the Crown in the present case rests is, that the Statute 1 Vict. c. 85, § 3, must be so construed by implication as to deprive the prisoner of the privilege of this peremptory challenge; that inasmuch as the punishment of death has been directly taken away by the Statute of 7 & 8 Geo. 4, which before was indirectly taken away by the allowance of clergy, so,

* 488 * by implication, the right of peremptory challenge has been also abolished with the capital punishment. But it appears to me that such an implication cannot be resorted to, in the case of a privilege beneficial to a prisoner, and enjoyed by him in practice, if not in strict right, for centuries, unless such implication be unavoidable to give effect to the statute. No such necessity appears to exist; and upon these grounds, I humbly offer as my opinion, in answer to your Lordships' question, that the peremptory challenge tendered in this case ought to have been allowed.

LORD CHANCELLOR. — My Lords, I beg leave to say that I do not find I can add any thing to the reasonings and arguments of the majority of the learned Judges in this case. I am quite satisfied that the conclusion to which they have come is the correct conclusion, and therefore I shall move your Lordships that the judgment of the Court below be reversed, and that a *venire de novo* should be awarded.

LORD BROUGHAM. — I entirely agree with my noble and learned friend upon this point. I have never, indeed, during the whole course of the argument, entertained any doubt whatever upon it; and I have not been moved at all by the

arguments urged and pressed upon us from the *dicta* to be found respecting the supposed origin of this right of peremptory challenge; namely, that it was *in favorem vitæ*. That is the reason assigned for it; but it does not at all follow that the challenge may not be general. Although the reason assigned for its origin may be justly stated to be *in favorem vitæ*, it is because all felony in its nature is capital; and until clergy is * prayed upon a conviction for that * 489 offence, *non constat* that it may not be capital even in clergyable cases.

I need not enter further into this matter, which has been so fully, so elaborately, and so satisfactorily gone into by the learned Judges in delivering their opinions. I entirely agree in the motion of my noble and learned friend, that the judgment of the Court below should be reversed; and of course the result will be the granting of a *venire de novo*.

LORD CAMPBELL. — My Lords, I am likewise of opinion that the judgment in this case ought to be reversed; and, with all respect for the majority of the Irish Judges who pronounced it, and for the learned Baron who alone of the English Judges approves of it, I hardly think it necessary to say more than that they seem to me to have confounded the reason with the rule. Favour to life may very likely have been the reason why the rule was laid down that, in all cases of felony, the prisoner on his trial should be entitled to peremptory challenge; but there can be no doubt that the rule was established. The rule being established, must remain till altered by the legislature; and the legislature, instead of altering it, has recognized its application to felonies which are not capital. It is acknowledged on all hands that the legislature never contemplated taking away the right of peremptory challenge; and if that right ever existed, it still exists.

Reliance is placed upon the practice of not allowing peremptory challenges on collateral issues; but this is decisive to show that the rule is, not that there shall be a peremptory challenge where life is in danger, and in no other cases; for life may well be in * danger upon the trial of a col- * 490

lateral issue, as in the case of Mr. Ratcliffe, (*a*) who, upon his identity being decided by the trial of a collateral issue, was led from the bar to execution.

I must likewise observe that I should have been reluctant, without strong authority, to sanction a judgment which introduces such an unequal law between the Crown and the prisoner. According to the interpretation of the old statutes on this subject, the Crown, practically speaking, has an unlimited right of peremptory challenge, not being obliged to assign a cause of challenge till the panel is exhausted; and to allow not a single challenge, without cause assigned and proved, to the prisoner, where the punishment may be transportation for life and forfeiture of property, would be inconsistent with the fair administration of the criminal law.

It was ordered that the judgment of the Court below should be reversed, and a *venire de novo* awarded.¹

(*a*) 18 Howell's St. Tr. 429; Foster's Cr. Law, 40. See also *Raleigh's Case*, 2 Howell's St. Tr. 33; and Jardine's "Criminal Trials," vol. 1, p. 497.

¹ See *Winsor v. The Queen*, L. R. 1 Q. B. 289.

* CREED v. CREED.

1844.

CATHERINE CREED *Appellant.*
FRANCIS CREED and Others *Respondents.*

Will — Real Estate. Annuities. Legacies. Priority.

A testator gave his wife his freehold estate of B., and certain specific chattels; and also an annuity for her life, charged upon all his real estates (except B.), with power of distress for the same, the first payment thereof to be made on the 1st of May or November which should first happen after his decease. He then charged his debts upon his real estates (except B.), in aid of his personal estate; and gave an annuity to his sister, in similar terms to those used respecting that given to his wife. He next gave several pecuniary legacies to nieces and others, to be paid by his trustees, as soon as convenient after his decease, out of the residue of his personal estate, and in deficiency thereof, to be raised and paid by them, as they should think proper, out of his real estates (except B.), and he charged the same therewith. He lastly gave two annuities to his servants, in similar terms to those used respecting the preceding annuities.

The personal estate was insufficient to pay the debts and legacies; the real estate was insufficient to pay the annuities and legacies.

Held, upon the true construction of the provisions of the will, that, as to the real estate, the annuities were entitled to priority over the legacies.¹

April 18; September 4, 1844.

CHARLES CREED, by his will, dated the 27th of May, 1814, bequeathed to his wife (the appellant), her heirs and assigns for ever, all his estate and interest in his house, demesne, and lands of Ballinanty, subject to the rent payable thereout, and also his carriage, carriage-horses, plate, &c., all freed and discharged from his debts: and he also bequeathed to her an annuity or yearly rent-charge of 1000*l.* during her life,

¹ See *Conron v. Conron*, 7 H. L. Cas. 168; *Maskell v. Farrington*, 8 De G., J. & S. 338; *Miller v. Huddleston*, 3 Mac. & G. 513; *Towle v. Swasey*, 106 Mass. 100.

charged upon and to be issuing and payable to her and her assigns yearly, out of all his real and freehold estates and properties, wheresoever situate, except Ballinanty, and to be paid by two equal moieties in the year, on every 1st of May and 1st of November, the first payment thereof to be

* 492 made * on such of said days as should first happen after his decease, and he charged and incumbered the same therewith, and empowered her and her assigns to take every remedy for recovery thereof as in cases of rent-service was usual; and he directed that his debts and funeral expenses should be paid as soon as conveniently might be, out of his personal property not before disposed of, if sufficient for that purpose; and that any deficiency thereof should be raised and paid by his trustees and executors, in such manner as they should think proper, out of his real and freehold estates and properties, except Ballinanty; and he charged and incumbered the same therewith. The testator also bequeathed to his sister, Anne Bond, an annuity or yearly rent-charge of 100*l.* for her life, to be issuing and payable to her and her assigns, out of his real and freehold estates and properties, except Ballinanty, by two equal moieties in the year, on the days before mentioned, the first payment thereof to be made on such of the said days as should first happen after his decease; and he charged and incumbered his real and freehold properties therewith, and empowered her and her assigns to take such remedies for recovery thereof as in cases of rent-service was usual. The testator then bequeathed to his niece Mary Lee, 2000*l.*, to his niece Mary Rose, 2000*l.*, to his reputed son Charles Creed, 5000*l.*, and to his friend John Lyne, 2000*l.*; these several legacies to be paid by his trustees and executors as soon as conveniently could be after his decease, out of such part of his personal estate as might remain after the payment of his debts and funeral expenses; and such parts of said legacies as might remain unpaid by the

personal estate, to be raised and paid by his trustees and

* 493 executors, in such manner as they should think * proper, out of his real and freehold properties, except Ballinanty, and he charged and incumbered the same therewith. The testator then bequeathed to his servant Alexander Keefe,

an annuity or yearly rent-charge of 80*l.* for his life, and to his servant Thomas Tracy, an annuity or yearly rent-charge of 50*l.* for his life ; these respective annuities to be paid to them or their assigns by two equal payments on the days before mentioned, the first payment thereof to be made on such of the said days as should first happen after his decease, out of his real and freehold properties, except Ballinanty ; and he charged and incumbered the same therewith, and empowered Keefe and Tracy and their assigns, respectively, to take such remedies for recovery thereof as in cases of rent-service was usual. The testator bequeathed all the residue and remainder of his real freehold and personal property to his brother William Creed (father of the respondent Francis Creed), his heirs, executors, administrators, and assigns for ever, and appointed him and David Roche trustees and executors of his will.

The testator died in June, 1814 : William Creed alone proved the will, and made sundry payments in discharge of the testator's debts, and on account of the annuities and legacies bequeathed by him. William Creed died in September, 1816, having devised all his property to his children, William, Francis, and Elizabeth Creed.

In February, 1817, the appellant filed a bill in the Court of Chancery in Ireland, against the personal representative of William Creed and others, for the purpose of recovering an arrear due to her on account of said annuity of 1000*l.* and of a jointure of 150*l.* a year, charged upon some of the lands comprised in * the will of her husband ; which * 494 bill, amongst other matters, prayed an account of his assets, real and personal, and that the trusts of his said will might be carried into execution.

By the decree made in that cause, it was declared that the trusts of the will should be carried into execution ; and it was referred to the Master to take the accounts prayed by the bill, and an account of the sums due to the appellant on foot of her jointure and annuity, with liberty to the creditors and legatees of the testator to prove their respective demands.

The Master, by his report, dated the 6th of March, 1826, reported the several sums due to the testator's respective

creditors, annuitants, and legatees; and in the same year a final decree was pronounced in the cause, whereby it was, amongst other matters, decreed that the several sums mentioned in the report should be paid by such of the defendants in the cause as ought so to do, or in default, that the lands therein specified should be sold, and out of the produce thereof the said sums be paid, with interest and costs.

Some of the testator's lands were accordingly sold, and further payments were made to his creditors.

In April, 1830, Francis Creed (the respondent), then the personal representative of the said William Creed, filed his bill against the appellant and others, for the purpose of reviewing the said report of 1826, and the decree founded thereupon; and after some proceedings had in the second cause, a consent order was made in both causes, dated the 14th of December, 1831, by which it was, amongst other matters, ordered that it should be referred to the Master to review the said report, and that said decree should be rectified, and made conformable to such new report as the Master should make.

* 495 * Pursuant to that order, the Master made his final report, intitled in both causes, and dated the 12th of January, 1839; whereby, amongst other matters, he found that a sum or 317*l.* 3*s.* 11*d.* was due to Francis Creed, as representative of William Creed, for payments made by William, on account of the annuities devised by the will of Charles Creed; and that there was also due to the said Francis, as said representative, a further sum of 1989*l.* 8*s.* 7½*d.* for payments made to legatees under the said will; and the Master submitted that Francis Creed was entitled to interest on the said sums, from the 2d of September, 1816, until paid. He also found that there was due to the appellant, on account of her annuity of 1000*l.*, a sum of 20,769*l.* 4*s.* 7½*d.* up to the 1st of November, 1838; and that a sum of 3498*l.* 9*s.* 3*d.* was due to the other annuitants; and a sum of 19,375*l.* 6*s.* 2*d.* to the several legatees under the said will.

On the 31st day of January, 1839, a decree was pronounced in both causes, whereby a sale of the remainder of

the testator's lands discharged from the annuities was directed, and full payment of his creditors and of the costs of all parties was directed, out of the produce of such sale, and out of funds then in bank. The decree reserved for further directions the rights and priorities of Francis Creed, as to the two sums of 317*l.* 3*s.* 11*d.* and 1980*l.* 8*s.* 7*d.*, and of the annuitants and legatees, as to the surplus fund, until the same should be ascertained.

Pursuant to this decree, the lands therein mentioned were sold, and the reported creditors, and the costs of all parties, having been paid, a surplus fund, amounting to 12,000*l.* or thereabouts, remained to be distributed according to the rights of the parties entitled thereto.

* On the 4th of June, 1841, the causes were heard * 496 before the Lord Chancellor (Lord PLUNKET), when it was decreed, that the respondent, Francis Creed, was entitled to the sum of 317*l.* 3*s.* 11*d.* mentioned in the Master's report of the 12th of January, 1839, together with interest thereon at five per cent from the 2d of September, 1816, out of the said surplus fund, and in priority to the rights of all other parties, save as to the costs therein mentioned. And it was further decreed, that the annuity of 1000*l.*, and the other annuities devised by the testator, were entitled to priority over the legacies bequeathed by him ; and that the residue of the surplus fund, after deducting the costs therein mentioned, be allocated to the appellant and the other annuitants, towards payment of the arrears reported due to them respectively on foot of their annuities, ratably in proportion to the sums reported due to them. And it was further decreed, that the said sum of 317*l.* 3*s.* 11*d.* and interest be deducted from the sums allocated to the respective annuitants, in the proportion in which the sums were paid to them respectively, on foot of their annuities, by William Creed. And it was declared that this decree was without prejudice to the rights of Francis Creed, as representative of William, to recover from the legatees or their representatives the amount of the sums paid by William to the legatees respectively.

Francis Creed presented a petition of rehearing, and the said causes came on to be heard on the 6th of December,

1841, before Sir EDWARD SUGDEN, then Lord Chancellor of Ireland, who thereupon ordered (*a*) that the decree of the 4th of June, 1841, so far as the same declared that the annuity of 1000*l.*, and the other annuities devised by the * 497 testator, were entitled * to priority over the legacies bequeathed by him, and the consequent directions thereon, should be varied: and it was declared, that according to the true construction of the will, the legacies and annuities thereby bequeathed were not entitled to any priority one over the other, but were to abate ratably, the real and personal estate of the testator not being sufficient for payment thereof; that in ascertaining the portion of the produce of the real and personal estate to which the said annuitants and legatees were respectively entitled, they were to be debited with the payments already made to them out of the said real and personal estate; that it should be referred to the Master to put a value on the annuities respectively at the time of the decease of the testator; and that the Master should ascertain what portion of his real and personal estate had been already applied in part payment of the respective legacies and annuities, and also the portion of his real and personal estate still applicable to the payment of said annuities and legacies; that the Master should allocate the funds so remaining among said legatees and annuitants ratably, according to the amount of their respective legacies, and the value of said respective annuities, having regard to the payments already made to the annuitants and legatees, out of the real and personal estate of the testator; that Francis Creed was entitled to be paid the balance as decreed to him by the decree of the 31st of January, 1839, out of the sums which should be allocated to the said annuitants and legatees, according to the portions of the said balance advanced by William Creed to the said several and respective annuitants and legatees; that the Master should report the portions thereof which should be so repaid by the said annuitants and * 498 legatees; and that he should, in proceeding * under this decree, set apart, out of the funds in bank to the

(*a*) 1 Dru. & War. 416; see p. 428; 4 Ir. Eq. Rep. 525.

credit of these causes, so much thereof as would be equivalent to the costs of obtaining the allocation report and order for payment: and it was further ordered, that this decree should be without prejudice to the right of Francis Creed, as representative of William Creed, to recover from the respective annuitants and legatees, or their representatives, the amount of the sums paid by William Creed to the annuitants and legatees respectively, and which the fund in these causes should be insufficient to liquidate.

Catherine Creed, (*a*) the annuitant of 1000*l.*, and plaintiff in the original cause, presented a petition of appeal against this decree, praying that it be reversed or varied, and made conformable to the decree of the 4th of June, 1841.

Mr. Fleming, for the appellant. — The decree pronounced by Lord Chancellor SUGDEN reversed that part of Lord PLUNKET's decree which declared the right of the appellant and the other annuitants to a priority over the legacies. The appellant submits, upon the intention and true construction of the provisions of the will, that the annuities are entitled to such priority; and that therefore they ought not to abate with the legacies, but be paid in full, so far as the fund in bank, consisting of the proceeds of the real estate, shall extend to pay them.

There is no report or note of the arguments before Lord PLUNKET, or of his reasons for his decree. In the report of the case on the rehearing before Sir E. SUGDEN, he says: (*b*) "As regards the nature of the property, it is said that the subject of the will is real * estate, &c. An an- * 499 nuity is always treated as a legacy; and it would be difficult to hold in this case that the annuity as coming out of real estate was specific, and that the legacy of 2000*l.* and the other legacies were not equally so." The learned Judge proceeds to give his reasons for that position, supposing that the

(*a*) She died before the appeal came on to be heard. The suit in the Court below, and the appeal here, were revived by her personal representative. This made no difference, and therefore is not noticed, in the arguments or judgment.

(*b*) 1 Dru. & War. 424; 4 Ir. Eq. Rep. 525.

legacies are charged in the same manner on the real estate as the annuities are ; but in that supposition he falls into an error of fact ; and the same error pervades his decree.

The annuities are by the will made legal rent-charges on the real estate, and payable out of that estate alone ; whereas the legacies are primarily payable out of the personal estate ; it is only on a deficiency of that fund that the real estate is to be resorted to for their payment. There appears on the face of the will clear indications of intention to prefer the annuities ; they are made payable by equal moieties on the 1st of May and 1st of November, “ the first payment to be made on such of the said days as should first happen after the testator’s decease ; ” whereas the legacies are directed to be paid only as soon as conveniently could be after his decease ; that is, one year at least. Although the real estate is charged with the legacies, such parts only of them as should remain unpaid out of the personalty are recoverable from the trustees and executors ; whereas the annuitants are empowered to enter on the real estate itself, to distrain and “ to take all and every remedy for recovery of their annuities as in cases of rent-service.” These are material distinctions, in the provisions of the will, in favour of priority of the annuities over the legacies. There is no direct devise of the estate for payment of the legacies ; there is only a power or direction to

the trustees and executors to raise and pay them, as
 * 500 they should think proper, out of the real * estate, in aid of the personalty ; and that cannot override the direct power given to the annuitants and their assigns to resort for payment to the real estates themselves, which is equivalent to a devise of specific portions of the estates.

The question in this case is to be decided on the construction of the express provisions of the will. The testator has manifested, by those provisions, a clear intention to give his wife and the other annuitants — his sister and attached servants — a priority over the pecuniary legatees, who were only distantly related to him, and one, a stranger in blood. The annuitants’ rent-charges are specific legacies ; and as specific legatees they are in a better position than if the whole estate was devised to them, charged with the legacies. With rent-

charges so charged as to amount to specific legacies, a general charge of pecuniary legacies cannot be put in competition. *Long v. Short*, (a) *Duke of Devon v. Atkins*, (b) *Ashton v. Ashton*, (c) *Martin v. Hooper*. (d) The charge of general legacies upon real estate in aid of the personal property does not change their nature and make them specific legacies, whilst every legacy primarily charged on real estate is a specific legacy. *Mann v. Copland*, (e) *Kirby v. Potter*, (g) *Masters v. Masters*. (h)

[LORD CAMPBELL. — If the freehold estate was directly devised to the widow charged with these legacies, would they not be payable out of it, though the payments might exhaust it and the widow might not get any thing?]

That question may be answered in the affirmative.

* But the widow is in a better position; her rent-charge being a specific legacy, is not overreached by the power given to the trustees and executors to raise the legacies; that power must be construed in reference to the subject for which it was given, — the payment of general legacies.

That part of the decree which directs the Master to set a value on the annuities — as in 1814 — is clearly erroneous.

Mr. Cooper and *Mr. Wood*, for the respondents. — This would appear to be a clear case, were it not for Lord PLUNKET's judgment, which alone made it necessary to go into argument in support of Sir E. SUGDEN's decree. The question is, what was the testator's intention, and what are the rules of construction applicable to it? The general rule is, that where annuities and legacies are given by a will, all the parties intended to be benefited are to take equally, unless a contrary intention appears on the face of the will. *Beeston v. Booth*, (i) *Brown v. Brown*. (k)

(a) 1 P. Wms. 403.

(c) 3 P. Wms. 383.

(e) 4 Ves. 751.

(h) 1 P. Wms. 420.

(k) 1 Keen, 277.

(b) 2 P. Wms. 381.

(d) Ridg. 206.

(g) 2 Madd. 223.

(i) 4 Madd. 168.

The will in this case does not show any preference of the annuities over the other legacies; but the contrary, because the latter are made payable out of the personalty, and in default thereof, out of the realty, having both estates subject to them; whereas the annuities are payable out of the realty only. The personalty having been found deficient, being exhausted by payment of the debts, and the real estate being also found insufficient for payment of both annuities and legacies, an intention to prefer the annuities is sought to be inferred, because they are rent-charges with express power of distress. But the legacies are also charged on the real estate, and there is no difference between a pure charge on real estate and a charge with power of distress,

* 502 as all rent-charges contain, * by implication, powers of distress. *Buttery v. Robinson*, (a) *Williams v. Brown*. (b)

The case of *Masters v. Masters*, (c) and other cases cited for the appellant, are not applicable here, as the circumstances of those cases were very different from those of the present case. An annuity to a testator's widow is entitled to priority only when it is in lieu of dower; *Lewin v. Lewin*, (d) which is not the case here, as the appellant had not only her jointure, but also an estate left her by the will, with other gifts, discharged of all liabilities.

As to that part of the decree directing the Master to put a value on the annuities, as in 1814, that is the practice in the Courts of Equity in England, from which there is no reason to depart here. And the answer to the criticism on another part of the decree, as to mixing the personal with the real estate, is, that as the annuities were payable out of the real estate only, there is no difficulty in construing the words of the decree *reddendo singula singulis*.

[LORD COTTENHAM. — Suppose the general legatees to have already received fifty per cent, or nearly all of their legacies, out of the personalty, are they to share equally in the real

(a) 8 Bing. 392.

(b) C. P. Coop. 363.

(c) 1 P. Wms. 420.

(d) 2 Ves. Sen. 415.

estate with the annuitants, who have had nothing out of the personalty?]

Yes ; because the legacies are charged on both estates ; and that is one reason for contending that the legatees were preferred to the annuitants by the testator himself. In the supposed case, all the annuitants, on a deficiency of the real estate, must abate upon the whole of their demand, but the other legatees are to abate only in respect of the unsatisfied parts of their legacies.

[LORD COTTENHAM.— That is not according to this decree, which directs the allocation of the residue of * the estate according to the original amount of the * 503 annuities and legacies. The decree seems to aim at equality between all the parties ; but how is that to be carried out by the Master if, as in the circumstances I have supposed, the legatees have been paid part of their legacies out of the personalty, and the annuitants have got none ? If the legatees received 3000*l.* of their legacies out of the personal estate remaining after payment of debts, are they to retain that sum, and come on the real estate *pari passu* with the annuitants ? The decree must be altered in that respect. It is also wrong in directing a sale of the freehold estate, discharged of the annuities ; that estate should be sold subject to the annuities.]

The counsel for the respondents proceeded. — There is some obscurity in that part of the decree, which might mislead the Master in his allocation, unless he first made himself well acquainted with the facts. He would have to investigate and ascertain the facts ; and if he found any difficulty, then the Court, on application, would construe its own decree. It appears, from the Master's first report, that William Creed, the executor, had a judgment of 9000*l.*, which absorbed the whole of the personal estate amounting only to 8000*l.* It was necessary to sell the real estate for payment of the debts, which being now all paid, the question

is what is to be done with the residue of the proceeds remaining in Court or bank to the credit of the cause ?

All the bequests being equally charged on the real estate, must be paid equally. If the annuities were held to be devises of the real estate, as, in fact, they seem to be, the power to raise and pay the legacies would overreach the devises.

Beale v. Beale. (a)

* 504 * There is no objection to the principle of the decree, that all the charges are to be paid equally ; it may appear to be a hardship on the annuitants ; but it is clear on the words of the will that the legatees are to be paid, first, out of the personal estate, as far as the residue of that, after payment of the debts, extended, and for the unsatisfied part of their demands they are to come on the real estate *pari passu* with the annuitants. The decree may be altered in some parts, so as to make the consequential directions to the Master clearer, but no alteration can be made to give the annuitants any relief that they did not ask in the Court below. The relief asked by the original bill, and declared by the decree in that cause, was, that the annuity was charged on the real estate ; the appellant is, therefore, now precluded from saying that the real estate was not administrable in equity. The Master's report takes the accounts of the real as well as the personal estate, and shows that the personalty was all swept away by the judgment debts. The report further shows that the payments made to the annuitants, as well as the other legatees, were out of a mixed fund of the realty and personalty.

Mr. Fleming, in reply, said : The error of fact made by Sir E. SUGDEN in his judgment and decree has been already observed on, in aid of the argument against the principle of the decree, showing how that error of fact led the learned Judge into an error of law. The same error pervades the argument now urged for the respondents, because it is contended that the pecuniary legatees are to be preferred ;

(a) 1 P. Wms. 246.

whereas it is clear, on the will, that no such preference was intended.

No case has been or can be cited, in which a legacy exclusively charged on real estate was made to abate * in favour of a general legacy primarily payable out * 505 of personalty.

September 4.

LORD COTTENHAM. — The duty of the House in this case is to decide between conflicting judgments of two learned Judges of high authority, — the late and the present Chancellors of Ireland. The fund to be administered arose from the sale of the testator's freehold estate, the personalty having proved insufficient for the payment of his debts. By Lord PLUNKET's decree, the annuities bequeathed to the appellant and the other annuitants were declared entitled to priority over the legacies. By Sir EDWARD SUGDEN's decree it was declared that "the legacies and annuities were not entitled to any priority one over the other, but were to abate ratably, the real and personal estate not being sufficient for the payment thereof." And in the subsequent directions, it treats the real and personal estate as applicable to pay the legacies and annuities in equal proportions.

The question must be decided by the terms of the will, and the rules which the Courts have applied to similar bequests.

This gift of the annuities is in this form: I leave and bequeath an annuity or yearly rent-charge of so much for life, charged upon and payable out of all my real and freehold estates and properties, except Ballinanty; and I do hereby charge and incumber the same therewith, and also empower the annuitant to take all and every remedy for recovery thereof as in cases of rent-service as usual.

The gift of the legacies is in this form: After giving several pecuniary legacies without reference to any fund for payment, the will proceeds thus: The said several legacies to be paid by my trustees and executors, * as soon as * 506 conveniently may be after my decease, out of such part

of my personal estate aforesaid as may remain after payment of my debts and funeral expenses; and such part of said legacies as shall or may remain unpaid by the said personal estate, to be raised and paid by my trustees and executors, in such manner as they shall think proper, out of my real and freehold properties, except Ballinanty aforesaid; and I do hereby charge and incumber the same herewith.

It is first to be considered whether the provisions of the will afford evidence of intention as to the funds to be applied in payment of the annuities and legacies respectively. There is no independent gift of the annuities unconnected with the direction that they should be charged upon and payable and issuing out of the real and freehold estates; and the remedy for the recovery of them is to be such as is usual in cases of rent-service, contemplating that the annuities would continue charges upon the real estate. But the legacies are, in the first instance, to be paid out of so much of the personal estate as should remain after payment of debts and funeral expenses, and so much only of such legacies as shall not be paid out of the personal estate was to be raised and paid out of the real and freehold property; thus negating any intention of applying any part of the personal estate in payment of the annuities, by appropriating it to the payment of debts, funeral expenses, and legacies exclusively, but making it the primary fund for the payment of legacies.

These provisions clearly prove that the personal estate was to be the primary fund for payment of the legacies, and, as it appears to me no less clearly, that the real estate was to be first applied towards payment of the annuities; for if not so,

the personal estate would be applicable in the first in-

* 507 stance to * provide for the annuities as well as for the

legacies. But the testator declared the contrary by directing that so much of the personal estate as should not be expended in payment of debts and funeral expenses, should be applied towards payment of the legacies, excluding the application of it towards providing for the annuities, which he had made rent-charges upon his lands. If the gifts of the annuities are to be considered as gifts of specific interests in

the real estate, they could not be affected by a general charge of legacies. *Spong v. Spong*. (a) The sale of the land for payment of the legacies ought, therefore, to have been subject to the annuities; and if sold discharged from them, the proceeds must be subject to the same liability.

If this be the true construction of the will, the application of the rule of equity to the case is very simple. Each claimant under the will must first resort to the fund primarily liable to his demand. If the personalty had been large and the realty small, the legatees would have had the advantage over the annuitants; and as the reverse has proved to be the fact, the advantage is on the side of the annuitants. It is true that equity aims at equality, and inclines to the construction which promotes it; but the intention, if expressed, must be the guide, and it seems to me to be impossible to put the annuitants and legatees upon the same footing, without doing violence to every provision of the will. Is it, for instance, consistent with the declared intention to treat the personal estate as equally applicable to provide for the annuitants and to pay the legacies? Yet this is the effect of the decree appealed from. To support the decree it must be shown, not only that the legacies * are payable *pari* * 508 *passu* with the annuities out of the realty, but that the annuities are payable *pari passu* with the legacies out of the personalty; otherwise the equality aimed at will not be attained.

It appears there are but two modes by which the annuities and legacies can be put upon the same footing: first, by considering the annuities as general bequests, and not as specific gifts of interest in the lands; or, secondly, by considering the legacies as specific gifts of interest in the lands. As to the first, gifts of annuities were formerly treated as specific; but when Sir JOSEPH JEKYLL, in *Rogers v. Millicent*, (b) decided that a direction to lay out money in the purchase of an annuity was only a pecuniary legacy, it was thought impossible to maintain the distinction, and all simple gifts of annuities

(a) 3 Bli. n. s. 84; s. c. 1 Dow & Cl. 365. [This case was approved in *Conron v. Conron*, 7 H. L. Cas. 168.]

(b) 2 Dick. 520.

were held to be pecuniary legacies. Such is the statement of Lord HARDWICKE, in *Lewin v. Lewin*. (a) This rule, however, has no application to the gift of a rent-charge or annuity issuing out of land; for that is an interest in the land itself, and necessarily specific. The very case occurred in *Long v. Short*, (b) in which there was a devise of a rent-charge out of a leasehold property to A., and a devise of the leasehold itself to B., and of fee-simple land to C.; and it was held that the devise of the rent-charge was as much a specific devise as if it had been of the term itself, and therefore that all three should contribute ratably to the payment of specialty debts. The same point was assumed in the case of *Devenhill v. Fletcher*: (c) 100*l. per annum* was given to the testator's wife, to be paid out of a freehold estate, and 500*l.*, which, together with the annuity, was to be in * 509 full of dower * and thirds. A question was made whether, under the provision, upon a deficiency of assets, the 500*l.* should abate; but no such question was made as to the annuity.

In *Mann v. Copland*, (d) an annuity made payable out of the rents of a house, was held to be payable out of the general estate, the devise of the house failing. But the decision would have been the other way, if Sir THOMAS PLUMER had found upon the face of the will, what he thought sufficient to prove that the testator meant to give a sum out of his personal estate, to be set apart as a fund for the payment of the legacy: he says, "the legacy is not so specific and so connected with the fund as to fail if there is no such fund, it appearing there was a fixed, independent, separate, distinct intent to give the legacy; the particular property out of which it was to be paid, being a secondary thought."

There are many cases in which, though a legacy be charged upon a particular fund, it does not fail by failure of the fund; which are called demonstrative legacies;¹ but these all proceed upon the construction showing a general intent. Such

(a) 2 Ves. Sen. 415.

(b) 1 P. Wms. 403.

(c) Amb. 244.

(d) 2 Madd. 223.

¹ See *Wilcox v. Wilcox*, 13 Allen, 256; *Pierrepoint v. Edwards*, 25 N. Y. 128.

was the case of *Fowler v. Willoughby*. (a) But in such cases, if the particular fund be applicable, the legatee is entitled to the benefit of it in preference to others having only a general claim. Such was the case of *Acton v. Acton*. (b) Whether, therefore, the annuities in the present case be considered as specific gifts of interest in the lands, or as primarily payable out of them, no others, not standing in the same situation, can interfere with the rights of the annuitants. Do, then, the legatees stand in the same situation with reference to * the lands? Their claims are to pecuniary legacies, * 510 charged indeed upon the lands upon a deficiency of the personalty; but such a charge cannot alter the character of the legacies, or make them specific.

In *Wilcox v. Rhodes*, (c) the testator, after giving several legacies, guaranteed the same out of certain lands, and then gave other legacies; and it was held by Sir JOHN LEACH, and affirmed by Lord ELDON, that the first class were payable out of the general estate and were not specific, although, the general estate being insufficient to pay all, they were entitled to have the proceeds of the property upon which their legacies were guaranteed, applied exclusively to the payment of their legacies. General legacies do not become specific because they are payable out of the proceeds of real estate; but the gift of the proceeds of the sale of a real estate may be specific, as in *Page v. Leapingwell*. (d) So the charge of the legacies upon the real estate does not make them specific, although the annuities payable and issuing out of them are so.

It appears to me, therefore, that the annuities are specific gifts out of the real estate, and that the legacies are not; and consequently, that the annuitants are entitled to the preference given to them by the decree of Lord PLUNKET, which I think ought to be restored, and that of Sir EDWARD SUGDEN reversed.

LORD CAMPBELL. — I heard this case with my noble and learned friend who has just addressed your Lordships: I

(a) 2 Sim. & Stu. 354.

(c) 2 Russ. 452.

(b) 1 Meriv. 178.

(d) 18 Ves. 468.

attended to it most anxiously as it proceeded, and I have considered it very attentively since ; and, without any communication with my noble and learned friend on the subject,

I find that we have both arrived at the same conclusion. He has stated the reasons for this judgment so very clearly and accurately, that I do not feel it at all necessary to add any thing, and I shall content myself with saying that I fully concur in the view which he has taken.

Mr. Cooper. — It will be necessary for your Lordships to give a direction that the Court below shall be at liberty to deal with the costs of all parties to this appeal, in like manner as with the costs of the suit. The Court below will otherwise feel a difficulty in dealing with the costs of the appeal, this being an administration suit, unless such a direction is given.

LORD BROUGHAM. — What has the Court below to do with the costs here ?

Mr. Cooper. — Where executors appear at this bar in support of a judgment, I apprehend the Court below does in some way provide for their costs. The question is whether they can charge costs in the account, without having your Lordships' direction so to do.

LORD COTTENHAM. — No doubt the costs will be allowed.

LORD CAMPBELL. — Every trustee is allowed his expenses in the execution of the trust.

The decree was then reversed.

After the above judgment was pronounced, it was ascertained that further inquiry would be requisite, in order to determine the exact state of the accounts of the real and personal estates of the testator, and whether or not the latter had been exhausted. The following order was ultimately made : —

It is ordered and adjudged by the Lords, &c., that the said decree of the 6th of December, 1841, be, and the same is hereby reversed : and it is further ordered and adjudged that the said decree of the 4th of June, 1841, be altered as * follows ; viz. : It is declared that the * 512 annuity of 1000*l.* by the will of the testator, Charles Creed, given to Catherine Creed, and the other annuities given by the said will, are entitled to priority over the legacies bequeathed by the said testator, as to all the real and freehold estates and properties of the testator upon which such annuities are by the will charged, and out of which such annuities are thereby declared to be issuing and payable : and it is ordered that it be referred to one of the Masters of the Court of Chancery in Ireland, to ascertain and state what sums have arisen from the rents and produce or sale of any part of the real and freehold estates and properties of the testator so charged with the said annuities, and out of which the same are so made to be issuing and payable, and of the application thereof ; and in particular what parts thereof have been applied in payment of such annuities respectively, and what parts thereof, if any, have been applied in payment of any of the legacies bequeathed by the said will : and it is further ordered that the said Master do also inquire and state what sums arose from the personal estate of the said testator, and of the application thereof, and in particular what parts thereof, if any, have been applied in payment of any of the annuities so given by the said will ; and that the said Master do also ascertain and state what part of the real and personal estate remains unadministered, and what part of the funds remaining to be administered consists of, or arose from, the real and freehold estates and properties of the testator so charged with the said annuities ; and what part thereof arose from, and consists of, the general personal estate of the testator : and it is further ordered that the consideration of all further directions and costs be reserved until after the said Master shall have made his report ; and that any of the parties be at liberty to apply to the Court as they may be advised : and it is also further ordered that the cause be remitted back to the Court of Chancery in Ireland to proceed further therein as shall be just and consistent with this declaration and judgment. — *Lords' Journals*, 4th September, 1844.

1843.

JOHN KNIGHT and Others	<i>Appellants.</i>
SIR WILLIAM EDWARD ROUSE BOUGHTON, {	<i>Respondents.</i>
Baronet, and Others	

Device in Fee; whether Absolute or in Trust. Precatory Words.
Uncertainty of Subject.

R. P. K. being entitled, under a settlement and will of his grandfather, to real estates in tail male, with remainders to his cousins in tail, with remainder to himself in fee as right heir of the settlor, suffered a recovery, and acquired the fee-simple. He had other estates in fee-simple by purchase, and considerable personal estate. He by his will gave all his estates, real and personal, to his brother, T. A. K., if living at his own decease, and if not, to T. A. K.'s son, T. A. K. the younger; and in case he should die before the testator, to his eldest son or next descendant in the direct male line; and in case he should leave no such descendant, to the next male issue of his said brother and his next descendant in the direct male line; but in case no such issue or descendant of his said brother or nephew should be living at the time of the testator's decease, to the next descendant in the direct male line of his said grandfather, according to the purport of his will, under which the testator inherited those estates, subject in every case to certain reservations out of the rents; and he appointed the person who should inherit his said estates under his will his sole executor "and trustee, to carry the same and every thing contained therein duly into execution, confiding in the approved honour and integrity of his family to take no advantage of any technical inaccuracies, but to admit all the comparatively small reservations which he made out of so large a property, according to the plain and obvious meaning of his words." He then, after giving some legacies, gave his gems and other articles to the British Museum, "on condition that the next descendant in the direct male line then living of his said grandfather should be made an hereditary trustee, to be continued in perpetual succession to his next descendants in the direct male line." And he concluded thus: "I trust to the liberality of my successors to reward any others of my old servants and tenants according to their deserts; and to their justice, in continuing the estates in the male succession, accord-

ing to the will of the founder of the family, my above-named grandfather."

T. A. K. survived the testator, and died without leaving any son.

Held, that T. A. K. took the estates in fee, absolutely, and that no trust was, or was intended to be, created by the will, a discretion being left to the devisees to defeat the testator's expressed desire.

Semble, that the property to which the words of the desire applied, and the nature of the estate to be taken in it, were not sufficiently certain to raise a trust: Per the Lord Chancellor.¹

May 1, 9, 15, 22, 23, 26, and 30, 1843. September 4, 1844.

THIS was an appeal from a decree of the Master of the Rolls, upon the construction of the will of Richard Payne

¹ See Lewin Trusts (5th Eng. ed.), 105-109 and cases in notes; 1 Jarman Wills (3d Eng. ed.), 354 *et seq.* A trust will not be implied where either the objects intended to be benefited are imperfectly described, or the amount of the property to which the trust should attach is not sufficiently defined; for the difficulty that would attend the execution of such imperfect trusts is converted by the Court into an argument that no trust was really intended; and even where both objects and property are certain, yet no trust will arise if the construing it a trust would be a contradiction to the terms in which the preceding bequest is given; or if, all the circumstances considered, it is more probable the testator meant to communicate a mere discretion. Lewin Trusts (5th Eng. ed.), 105, 106, 108, and cases cited; Huskisson v. Bridge, 4 De G. & S. 245; Lefroy v. Flood, 4 Ir. Ch. R. 1; Shepherd v. Nottidge, 2 J. & Hem. 766; Russell v. Jackson, 10 Hare, 218; Flint v. Hughes, 6 Beav. 342; Lines v. Darden, 5 Florida, 51. Every case must depend upon the construction the Court gives to the language of the will upon which it arises. Negroes v. Palmer, 18 Md. 165; Meggison v. Moore, 2 Ves. Jr. 633. The question to be settled is, whether the testator, by the expression of his confidence or wishes, intended to impose a duty upon the devisee or legatee, or to leave him to act at his discretion. See 1 Jarman Wills (3d Eng. ed.), 354 *et seq.*; Webb v. Woods, 2 Sim. n. s. 267; Ware v. Mallard, 21 L. J. Ch. 355; 16 Jur. 492; Briggs v. Penny, 3 Mac. & G. (Am. ed.) 546 and cases in notes; Bernard v. Minshull, Johns. 376; Warner v. Bates, 98 Mass. 274, 277, 278; Harrisons v. Harrison, 2 Gratt. 1; Bonser v. Kinnear, 2 Giff. 195; Barrs v. Fewkes, 12 W. R. 666; 13 W. R. 987; Coates's Appeal, 2 Barr, 129; Van Amee v. Jackson, 35 Vt. 173; Pennock's Appeal, 20 Penn. St. 268; Gilbert v. Chapin, 19 Conn. 342; Harper v. Phelps, 21 Conn. 257; McKonkey's Appeal, 13 Penn. St. 253; Collins v. Carlisle, 7 B. Mon. 14; Eaton v. Watts, L. R. 4 Eq. 151; Meredith v. Heneage, 1 Sim. 542; s. c. 10 Price, 306; Bull v. Bull, 8 Conn. 47; Hill Trustees (4th Am. ed.) 73 and notes; Irvine v. Sullivan, L. R. 8 Eq. 673; Wood v. Cox, 2 My. & Cr. 684.

* 514 * Knight, who, at the time of making the same, and thenceforth down to, and at the time of his decease, was seised in fee-simple of divers freehold estates; and was also, at the time of his decease, possessed of a large personal estate, comprising, among other things, a valuable collection of gems and articles of virtu. The greater part of the freehold estates (known by the general name of the Downton estates, and situate in the counties of Hereford and Salop) had devolved on him as tenant in tail male under the will, and a settlement also of his grandfather Richard Knight, who died in 1745; (a) and he, previously to the date of his will, had, by common recoveries or other assurances, acquired the absolute fee-simple and inheritance of these estates. The testator's other freehold estates had been purchased by himself.

The will of Richard Payne Knight, dated 30th of June, 1814, and duly executed and attested for devising freehold estates, was as follows: "I give and bequeath all my estates, real and personal, except such parts as are hereinafter excepted, to my brother Thomas Andrew Knight, should he be living at the time of my decease; and if not, to his son, Thomas Andrew Knight the younger; and in case that he should die before me, to his eldest son or next descendant in the direct male line; and in case that he should leave no such descendant in the direct male line, to the next male issue of my said brother and his next descendant in the direct male line; but in case that no such issue or descendant of my said brother or nephew should be living at the time

* 515 of my decease, to the ** next descendant in the direct male line of my late grandfather Richard Knight, of Downton, according to the purport of his will, under which I have inherited those estates, which his industry and ability had acquired, and of which he had therefore the best right to dispose*; (b) subject nevertheless and liable in every case to the

(a) The settlement, and the substance of the will of Richard Knight, are stated in the report of this case, 3 Beavan, p. 148.

(b) On those passages printed in *italics*, in this and the next page, the question, whether a trust was created, depended, and they will be often referred to in the argument.

following reservations and deductions out of the rents and profits thereof, which I give and bequeath to the purposes and in the manner following." Here followed a bequest of 300*l.* to be distributed among the poor of Downton and other parishes in the county of Hereford. The will then went on thus : —

"And I do hereby constitute *and appoint the person who shall inherit my said estates under this my will, my sole executor and trustee, to carry the same and every thing contained herein duly into execution ; confiding in the approved honour and integrity of my family* to take no advantage of any technical inaccuracy, but to admit all the comparatively small reservations which I make out of so large a property, according to the plain and obvious meaning of my words."

The testator then bequeathed, "out of the said reserved rents and profits," a weekly sum of 25*s.* to his faithful servant Anne Payne, and 3*l.* weekly to a Mrs. Gregory, as a reward for her kindness to him ; and then proceeded : —

"And I moreover give and bequeath all coins and medals, and all wrought or sculptured articles in every kind of metal, ivory, and gems or precious stones, together with all descriptive catalogues of the * same ; and all drawings * 516 or books of drawings of every kind, which shall be found in the gallery or western room of my house in Soho Square, to the British Museum, on condition that, within one year after my decease, *the next descendant in the direct male line then living of my above-named grandfather, be made an hereditary trustee, with all the privileges of the other family trustees, to be continued in perpetual succession to his next descendants in the direct male line, so long as any shall exist, and in case of their failure, to the next in the female line ;* and also upon condition that all duties and other expenses attending the taking possession of and removing the said articles, be paid out of the funds of the said museum."

The will concluded thus : "*I trust to the liberality of my successors* to reward any others of my old servants and tenants according to their deserts ; and to *their justice, in continuing the estates in the male succession, according to the will*

of the founder of the family, my above-named grandfather, Richard Knight. Given under my hand," &c.

The testator died in April, 1824, without having revoked or altered his said will, leaving the said Thomas Andrew Knight, his only brother and heir-at-law, and Thomas Andrew Knight the younger, him surviving; and also leaving surviving him the appellant John Knight, and his sons, Frederic Winn Knight, Charles Allanson Knight, and Edward Lewis Knight, who are the other appellants; and also the said John's younger brother, Thomas Knight the elder, and his sons, Thomas Knight the younger and Edward Knight (three of the respondents), and other sons of the said Thomas Knight the elder, hereinafter mentioned. (See pedigree, *infra*, p. 524.)

Thomas Andrew Knight, soon after the testator's
 * 517 * death, proved his will, and possessed himself of his personal estate and effects, and entered into possession or receipt of the rents of the real estates. He also became a trustee of the British Museum, by virtue of the said will, and of an Act of Parliament, 5 Geo. 4, c. 68, passed pursuant thereto, for vesting the said bequests of R. Payne Knight in the trustees of the museum, in perpetuity.

By indentures of lease and release and assignment, dated respectively the 27th and 28th of December, 1825, the release and assignment being made between the said T. A. Knight of the first part, T. A. Knight the younger of the second part, and Thomas Pendarves Stackhouse of the third part, — after reciting the will of R. Payne Knight, and that it was apprehended that T. A. Knight was not made subject to or bound by any trust by virtue thereof, or if bound by a trust, that he might exercise or perform the same by settling the real estate, so devised as aforesaid, on T. A. Knight the younger, his only son, in tail male, and by settling the personal estate on him and the heirs male of his body, subject, nevertheless, to an estate for the life of T. A. Knight therein; and further reciting that T. A. Knight, with the consent and approbation of T. A. Knight the younger, had determined to settle the said real and personal estate accordingly, — it was

witnessed that the said T. A. Knight, in pursuance of such determination, and with such consent and approbation, granted and released to the said T. P. Stackhouse, his heirs and assigns, all the manors, lands, tenements, and hereditaments devised by the said will; to hold the same to the use of T. A. Knight and his assigns during his life, with remainder to the use of T. A. Knight the younger and the heirs male of his body, and in default of such issue, to the use of * T. A. Knight, his heirs and assigns for ever, subject, * 518 nevertheless, to the trusts, if any, created by the said will, and which were not performed or duly executed by such indenture: and by the same release and assignment, T. A. Knight also assigned to T. P. Stackhouse, his executors and administrators, all the personal estate and effects which were the property of R. Payne Knight at the time of his decease, and of which any trusts were in terms, or by construction, or in effect, declared by his will for the benefit of the members of the Knight family; to hold the same in trust, to permit T. A. Knight to have the use and enjoyment thereof during his life, and from and after his decease, in trust for T. A. Knight the younger and the heirs male of his body.

In Trinity term, 1826, T. A. Knight, with Frances his wife, and T. A. Knight the younger, suffered a recovery of the devised estates in the county of Hereford, to the use of T. A. Knight, his heirs and assigns.

T. A. Knight the younger did no other act to affect the real or the personal estates of R. Payne Knight, and in November, 1827, he died without issue and intestate; and T. A. Knight, his father, duly obtained administration of his goods and chattels, rights and credits.

By indentures of lease and release, dated respectively the 24th and 25th of April, 1835, and made between T. A. Knight and Sir W. E. R. Boughton, Bart. (one of the respondents), — the lease reciting that doubts were entertained whether T. A. Knight was not tenant in tail at law or in equity of the messuages, lands, and hereditaments described in the schedule thereto, and that he had determined to bar the same estate tail, if any, — it was witnessed, that in pur-

suance of the said determination, and also of the
 * 519 powers and * provisions of the Act 3 & 4 Will. 4, c. 74,
 for the abolition of fines and recoveries, &c., T. A.
 Knight granted, bargained, sold, released, and confirmed to
 Sir W. E. R. Boughton and his heirs, the messuages, lands,
 and hereditaments described or referred to in the said sched-
 ule, and situate in the counties of Middlesex, Salop, and
 Gloucester (being part of the estates devised by the said
 will of R. Payne Knight); to hold the same, discharged of
 all estates in tail and interests in the nature of estates tail,
 to the use of T. A. Knight, his heirs and assigns, in fee-
 simple.

The appellants, in the year 1836, exhibited their bill in
 Chancery against the said T. A. Knight, Thomas Knight the
 elder, and his sons T. Knight the younger and Edw. Knight,
 and against John Knight and Humphrey Senhouse Knight
 (other sons of T. Knight the elder), then out of the jurisdic-
 tion, and also against Edw. Wynne Pendarves, the personal
 representative of T. P. Stackhouse, deceased, the trustee
 named in the indentures of December, 1825. The bill, after
 stating the wills, deeds, recovery, assurances, and facts before
 mentioned, among others, further stated that T. A. Knight
 had claimed to be absolutely entitled to all the real and per-
 sonal estates of the testator R. Payne Knight, and to be en-
 titled to cut down timber on the real estates, either by virtue
 of his will, or of the said indentures of December, 1825, and
 the said recovery, or by virtue of the said indentures of
 April, 1835; and that he had lately cut down divers timber
 and other trees which were standing on the said real estates,
 and disposed of them, and received and applied the proceeds
 to his own use; and had in like manner applied to his own
 use and benefit divers parts of the residuary personal
 * 520 * estate of the said testator. But the appellants stated
 that they were advised that the said indentures of
 December, 1825, and the recovery, and the indentures of
 April, 1835, were not in conformity to, but in violation of, the
 trusts and purposes of the will of the said testator, and that
 neither the defendant T. A. Knight nor the said T. A.
 Knight the younger could, by the said indentures, or any of

them, or by the said recovery, derive any title to any part of the real or personal estate of the said testator; and that his will contained a direction, and created a trust, in pursuance of which all his real estates ought to be conveyed, and all his residuary personal estate ought to be invested and secured, in such manner as might continue the enjoyment thereof in the male descendants of Richard Knight, the grandfather.

The bill prayed that the will of R. Payne Knight might be established, and the trusts thereof carried into execution; and that it might be declared that, according to the true construction thereof, and under the directions and trusts therein contained, all the real estates, and all the residue of the personal estate of the testator, ought to be conveyed and assigned in such manner as best to secure the enjoyment thereof to the male descendants of Richard Knight, the grandfather of the testator, as long as the rules of law and equity would permit; and for that purpose, that the same ought to be so limited, conveyed, and assigned that the defendant T. A. Knight should have only a life estate therein, with such remainders to his issue male and to the appellants as might best answer the purposes aforesaid; and that all proper accounts might therefore be taken of the real and personal property of the testator, R. Payne Knight, and of the application of such personal estate, and * of * 521 all timber cut from the real estates since his death; and that proper persons might be appointed trustees of such real and personal estates and timber money; and that the defendants, T. A. Knight and Ed. Wynne Pendarves, might be decreed to execute all necessary and proper deeds, and do all necessary acts, for the purpose of conveying, assigning, and securing such real and personal estates and timber money accordingly.

The defendants, T. A. Knight, (a) T. Knight the elder, T. Knight the younger, and Ed. Wynne Pendarves, put in their answers to the bill.

In May, 1838, before the cause came to be heard, T. A.

(a) See the tenor of his answer, 3 Beav. 159.

Knight died. By his will, dated the 5th February, 1836, and duly executed and attested for passing freehold estates, he (after stating certain conferences (a) and arrangements between himself and his son, before the son's death, as to the future disposition of the estates devised by R. Payne Knight's will) devised and bequeathed unto the respondent Sir W. E. R. Boughton, his heirs, executors, administrators, and assigns, all his freehold, copyhold, and leasehold estates whatsoever and wheresoever situate, comprising as well those which were R. Payne Knight's as his own (excepting two messuages with their appurtenances situate as therein mentioned), upon certain trusts therein declared for the several benefits of the testator's wife, Frances Knight, of his daughters, Mrs. Acton and Mrs. Walpole, and of the said Sir W. E. R. Boughton and Dame Charlotte his wife (another of the testator's daughters), and of their second son Andrew Johnes Boughton. And after directing (among other things) that his household goods and furniture, books and pictures, &c., in his * mansion-house of Downton Castle, should be held and enjoyed with his said mansion-house and premises, so far as the rules of law and equity would admit, by the person or persons for the time being entitled under his will to the same mansion-house and premises respectively; as to all the residue of his personal estate and effects which he should die possessed of or entitled to, and not therein before disposed of, he bequeathed the same unto his wife, for her own absolute use and benefit.

The testator then made provision for the expenses of litigating the questions arising on the will of R. P. Knight; and in the event of its being ultimately decided that he had not the right of disposing of the real and personal estates of his said brother as he had done by his will, then and in such case only, and if he had power to direct the order of succession and appoint the real and personal estates of his said brother to such one or more of the male descendants of his grandfather Richard Knight as he should think proper, he gave and devised all and singular the real estates which were

(a) 8 Beav. 156.

the property of his brother R. Payne Knight, unto his cousin T. Knight the elder, for his life, with remainders to his sons, John, Robert, Edward, James, and Humphrey Senhouse Knight, successively in tail male. And as to the personal estate of his said brother, in the event only and under the circumstances aforesaid, and as far as he was authorized and enabled thereto, he bequeathed the same unto the said T. Knight the elder, for his life, and after his decease to the said J. Knight (his son) and the heirs male of his body; and for default of such issue, to the said Robert Knight and the heirs male of his body; and after devising all estates which should be vested in him as a trustee unto and to the use of Sir W. E. R. Boughton, his heirs and * as- * 523 signs for ever, upon and for the trusts and purposes for which he held the same respectively, he appointed him the sole executor of his will.

This will was duly proved by Sir W. E. R. Boughton, who thereby became the legal personal representative of T. A. Knight, and of R. Payne Knight; and also of T. A. Knight the younger, by obtaining administration *de bonis non* to him.

The appellants filed a bill of revivor and supplement against Sir W. E. R. Boughton and the other defendants to the original bill, and also against the several persons named and beneficially interested in the will of T. A. Knight, except Robert and James Knight, who died some time before. The suit and proceedings were accordingly revived by an order of Court, dated the 24th November, 1838; and by the decree made on the hearing of the causes in July, 1839, it was referred to the Master to inquire what male issue of Richard Knight the grandfather were *in esse* at the death of R. Payne Knight and since his death respectively, and whether any of them, and which, had since died.

The Master, by his report, found that the appellants (plaintiffs in both the causes) and the late T. A. Knight and his son T. A. Knight the younger, and the respondents T. Knight the elder, and his sons, T. Knight the younger, John, Edward, and Humphrey Senhouse, and his other sons, Robert, James, and William Knight, were the only male issue of Richard Knight the grandfather, who were *in esse* at the

time of the death of R. Payne Knight; that T. A. Knight and T. A. Knight the younger died respectively at the times before mentioned; that the said Robert died in 1834, James in 1836, and William in 1825, without issue; and the

* 524 Master found that the only * male issue of the said Richard Knight, who had come *in esse* since the death of R. Payne Knight, were John Knight the younger, James Thomas Knight, and Charles Knight, sons of the respondent John, and grandsons of the respondent T. Knight the elder.

On the death of T. A. Knight, the appellant John Knight, by virtue of R. Payne Knight's will and of the Act of Parliament before mentioned, and as the then next descendant in the direct male line of Richard Knight the grandfather, became and now is an hereditary trustee of the British Museum.

The causes were finally heard by the Master of the Rolls in December, 1839; and his Lordship, by his order dated the 7th of August, 1840, dismissed the bill. (a)

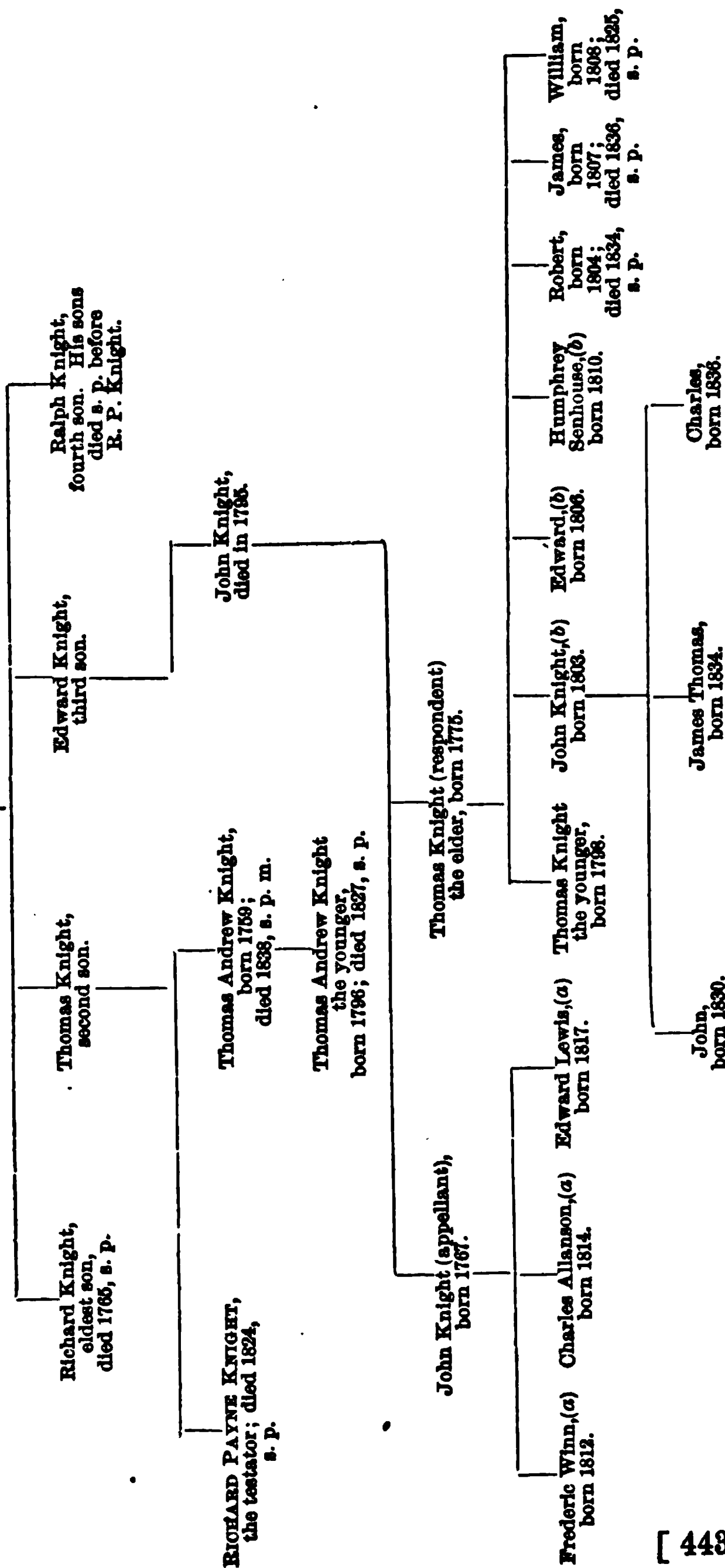
The appeal was brought against that order; and
* 525 * the questions were, whether Thomas Andrew Knight took an estate in fee-simple absolutely for his own benefit under the will of R. Payne Knight, or whether an executory trust was not thereby created for the benefit of the next male descendants of Richard Knight the grandfather.

The appellants, as such descendants, insisted that such trust was created by the will of R. Payne Knight.

The respondents consisted of two classes: the first class — viz., Sir W. E. R. Boughton and his wife, a daughter of the said T. A. Knight; Frances Knight, his widow; Mrs. Acton and Mrs. Walpole, two other daughters of the said T. A. Knight; and Andrew Johnes Boughton, a son of Sir W. and Lady Boughton — claimed various interests under the will of T. A. Knight, and contended that he was not a trustee, or if he was a trustee, that he had executed the trust by the conveyance, before stated, of the estates to the use of himself for life, with remainder to his son T. A. Knight the younger, in tail male, with remainder to himself in fee; and had also acquired the fee-simple by the recovery before

(a) 3 Beav. 148.

Male descendants of RICHARD KNIGHT, the Grandfather.



(a) Appellants.

(b) Respondents.

mentioned, previously to making his will. The second class of respondents, Thomas Knight the elder, and his sons, claimed interests under the appointment made by the will of T. A. Knight in their favour, and intended to take effect only in case he was not competent to dispose of the estates in favour of the first-named respondents, which T. Knight the elder, and his sons, contended he was not competent so to dispose of; agreeing so far with the appellants.

The only other respondent was Mr. Pendarves, who was the personal representative of the deceased trustee named in the indentures of 1825; but claimed no beneficial interest.

* 526 * *Mr. Pemberton Leigh* and *Mr. J. Humphry* (*Mr.*

G. Turner was with them), for the appellants.—It may be admitted that Thomas Andrew Knight took an estate in fee in the property devised to him by Richard Payne Knight; and the question is, whether he held that property absolutely at his own disposal, or subject to a trust for the benefit of the next male descendants of Richard Knight the grandfather. The Master of the Rolls entertained considerable doubts on that question, and came with much hesitation to the opinion that he took the property absolutely. T. A. Knight, assuming that he had an absolute power over the estates, disposed of them by his will, first to his daughter and her issue; and then, providing for the event of its being decided that he had not such power, he appointed those estates to certain male descendants of the grandfather, passing over the nearest male descendants altogether. The pedigree shows the state of the family at the respective deaths of both the testators.

It is hardly possible for any person, reading the several passages (a) in the will of R. Payne Knight, to say that he did not intend that the estates should be continued in the direct male line of the family. The questions to be decided are, first, whether a trust was not impliedly created by those words of “confidence in the honour of the family,” &c., and of “trust in their justice,” &c.; and, secondly, whether there

(a) See the passages printed in *italics*, *ante*, pp. 515–516.

is such uncertainty of subject and of objects as to render it impossible to carry such trust into execution? If the House should decide the first question in the affirmative, then no difficulty, it is submitted, will be allowed to stand in the way of framing a settlement to execute the trust according to the will.

* By affirming the order of the Master of the Rolls, * 527 the House would subvert a rule of construction that has subsisted for more than a century, and overturn hundreds of cases that have been decided in that time. The rule is first stated with clearness in the case of *Pierson v. Garnet*. (a) There the testator, bequeathing a residue to Peter Pierson, his executors, &c., added, "and it is my dying request to the said Peter Pierson, that if he shall die without issue living at his death he do dispose of what fortune he shall receive under this my will to and among the descendants of my late aunt." On the question whether these words created a trust, the Master of the Rolls (Sir LLOYD KENYON) said, "The principles appear to be those which are recognized by Lord THURLOW in the cases of *Harland v. Trigg* and *Wynne v. Hawkins*, (b) that where the property to be given is certain, and the objects to whom it is given are certain, there a trust is created. The principles were not first laid down by Lord THURLOW, but extracted by him with great wisdom from those cases on which preceding Chancellors have decided questions of this nature." He then referred to several cases, and upon the reasoning and authority of them, he held that the words were imperative and created a trust; and that decision was affirmed by the Lord Chancellor. (c) In *Malim v. Keighley*, (d) Lord ALVANLEY laid down the broad rule, that "wherever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shows clearly that his desire expressed is to be controlled by the party, and that he shall * have an option to defeat it." * 528 There also the decision that the words created a trust,

(a) 2 Bro. C. C. 38.

(b) 1 Bro. C. C. 142, 179.

(c) 2 Bro. C. C. 225.

(d) 2 Ves. Jun. 335, 529.

was affirmed on appeal. In *Cary v. Cary*, (a) Lord REDESDALE states the rule more fully, thus: "Where a testator, having in his power to dispose of property, expresses a desire as to the disposition of the property, and the objects to which he refers are certain, the desire so expressed amounts to a command; and if he shows his desire, he in fact expresses his intention, provided the objects to which he refers are so defined that a Court can act upon the desire so expressed. If he is sufficiently explicit in that respect, words expressing desire, words simply intimating that he has no doubt such and such things will be done, — will operate as imperative on the person to whom they are directed." This exposition of the rule is most important, as it embraces all the requisites to the creation of an executory trust. The rule is laid down in a similar manner, but more in form, by Lord ELDON in *Wright v. Atkins*, (b) in which the words held to create a trust were almost the same as in the present case. The devise was to the testator's mother, Mrs. A., "and her heirs for ever, in the fullest confidence that after her decease she will devise the property to my family." On a question whether Mrs. A. was impeachable of waste, Lord ELDON said, "I confess I cannot help thinking that if there is a title in the plaintiffs, it must be founded on the doctrine of trusts, that this is a fee given to Mrs. Atkins, with an obligation imposed upon her conscience to dispose of the property after her death to the family of the testator." His Lordship then says, "In order to determine whether the trust is a

* 529 trust, this Court will *interfere with, it is matter of observation, 1st, that the words must be imperative; that the words are imperative in this case there can be no doubt. 2dly, that the subject must be certain; and that brings me to the question, what is meant by the words 'the property'? 3dly, that the object must be as certain as the subject; and then the question will be, whether the words 'my family' have as much of the quality of certainty as this species of trust requires." The words of the will in *Prevost v. Clarke*, (c) which were held sufficient to raise a trust in a

(a) 2 Sch. & Lef. 189.

(b) Turn. & R. 157.

(c) 2 Madd. 458.

bequest of a residue of a personal estate, were these: "Convinced of the high sense of honour, &c., of my son-in-law, I entreat him, should he not be blessed with children by my daughter, and survive, that he will leave, at his decease, to my children and grandchildren the share of my property I have bestowed on her." In *Wood v. Cox* (a) the testatrix bequeathed "all her personal estate to Sir G. Cox, his heirs, executors, &c., for his and their own use and benefit for ever, trusting and wholly confiding in his honour that he will act in strict conformity with my wishes." She on the same day dictated a testamentary paper, containing a list of persons, ending thus: "Such is the wish of S. C." On the above words, Lord LANGDALE, M. R., held that Sir G. Cox was a trustee of all the testatrix's property; but Lord COTTENHAM (Chancellor) thought he was trustee only of so much as the testatrix expressed her wish about. (b)

In all these cases, decided by the most eminent Judges, supported by the reasoning and authority of * numerous other decisions to which attention shall * 530 be directed, the principle of the rule raising a trust on precatory words, is so well established that no Court can now venture to reverse or disturb it. Among the various useful recommendations of the Real Property Commissioners, on Wills, several of which have been carried into effect by the Wills Act (1 Victoria, c. 26), there was no recommendation or even suggestion to alter this rule. If the policy of it was considered objectionable, the commissioners would unquestionably have recommended some alteration or modification of it. The policy of the rule is stated by the Master of the Rolls, in *Pearson v. Garnet*; and the principle of it was collected with great wisdom by Lord THURLOW from former cases. The appellants ask no extension of the principle, but they protest against any contraction of it. The rule has been acted on for a long period, and is analogous to another rule on which Courts of Equity act, the rule *cy-près*, in the construction of instruments.

There are three essential requisites to the rule, according

(a) 1 Keen, 317.

(b) 2 My. & C. 684.

to the definition of it in most of the cases: 1st, the words indicating the testator's wish, such as "desire," "will," "request," "recommendation," "entreaty," "hoping," "not doubting," "confiding," "trusting," &c., must be so expressed as to be imperative on the person to whom the devise or bequest is made in the first instance; 2dly, the subject of the wish, &c., must be certain, or capable of being ascertained; and 3dly, the objects or persons to take the ultimate interest must also be certain, or so pointed out by the testator that they may be ascertained. All the requisites are found to concur in a great number of cases besides those before cited,

and they are stated in the third edition of Roper on * 531 * Legacies, (a) *Mason v. Limbury*, (b) *Eales v. England*, (c) *Harding v. Glyn*, (d) *Massey v. Shearman*, (e) *Nowlan v. Nelligan*, (g) *Brown v. Higgs*, (h) *Birch v. Wade*, (i) *Tibbits v. Tibbits*, (k) *Cruwys v. Colman*, (l) *Forbes v. Ball*, (m) *Horwood v. West*, (n) *Dashwood v. Peyton*. (o)

In the same book (p) are stated those cases in which one or more of the three requisites was wanting, and, consequently, the presumption of implied trust negatived. That two of those requisites exist in the present case, namely, words clearly expressing the testator's wishes, and pointing out the objects, was admitted by the Master of the Rolls in giving his judgment, (q) and is placed beyond doubt by the cases on the subject. The doubts entertained by the Master of the Rolls regarded the uncertainty of the property devised. The subject or property is considered uncertain when there is any legal doubt or ambiguity in the description of it, or when the amount is made to depend on a contingency, or a discretion is impliedly or expressly given to the first testator to dispose of the whole or any undefined part of it, or to augment or

(a) Vol. 2, p. 873 *et seq.*

(b) Cited in *Amb.* 4.

(c) *Prec. Chan.* 200.

(d) 1 *Atk.* 468; 5 *Ves.* 501; 8 *Ves.* 571; and *T. & R.* 161.

(e) *Amb.* 520.

(g) 1 *Bro. C. C.* 489.

(h) 4 *Ves.* 708; 5 *Ves.* 495; 8 *Ves.* 561; 18 *Ves.* 192.

(i) 3 *V. & B.* 198.

(k) 19 *Ves.* 655; 1 *Jac.* 317.

(l) 9 *Ves.* 319.

(m) 3 *Meriv.* 437.

(n) 1 *Sim. & Stu.* 387.

(o) 18 *Ves.* 41.

(p) 2 *Rop. on Leg.* 388.

(q) 3 *Beav.* 171, 177, 179.

diminish it. *Attorney-General v. Hall*, (a) *Bland v. Bland*, (b) *Wynne v. Hawkins*, (c) *Harland v. Trigg*, (d) *Sprange v. Barnard*, (e) *Pushman v. Filliter*, (g) *Morice v. The Bishop of Durham*, (h) * *Wilson v. Major*, (i) *Gibbs v. Rumsey*, (k) *Ellis v. Selby*, (l) *Lechmere v. Lavie*, (m) *Jarman on Wills*, (n) and *Jarman's Powell on Devises*, (o) *Eade v. Eade*, (p) *Curtis v. Rippon*, (q) *Sale v. Moore*, (r) *Shaw v. Lawless*, (s) *Ex parte Payne*. (t) * 532

The subject of the trust, in this case, is free from any legal uncertainty, which is the only uncertainty that the Courts notice. The testator gave all his estates real and personal to his devisee, except certain reservations to a charity and other purposes in the will mentioned. The trust therefore applies to the whole property so given; or if it should be held to apply only to the estates which came to the testator from his grandfather, they may be easily ascertained.

It was contended in the Court below, on behalf of the respondents, that the interest to be taken by the parties should be as certain as the subject: but there is no ground for that argument; it is not a part of the rule as laid down in the cases before cited, and there is no case to warrant it.

If it shall appear that an executory trust was created within the control of the Court, and that the objects and subjects are sufficiently certain, the next question is in what manner is it to be carried into effect. There can be no difficulty, in a Court of Equity, in effectuating the testator's intention. The whole of the will shows his anxiety to preserve the estates in his family, and the Court has jurisdiction to enforce his intention, if the family should be disposed to disappoint it. The difference between a trust executed

(a) Cited 1 Ves. Sen. 9.

(c) 1 Bro. C. C. 179.

(e) 2 Bro. C. C. 586.

(h) 9 Ves. 399; 10 Ves. 535.

(k) 2 V. & B. 298.

(m) 2 My. & K. 197.

(o) Vol. 1, p. 352 *et seq.* (notes).

(q) 5 Madd. 434.

(s) 5 Cl. & Fin. 129.

(b) 2 Cox, 349.

(d) 1 Bro. C. C. 142.

(g) 3 Ves. Jun. 7.

(i) 11 Ves. 205.

(l) 1 My. & C. 286.

(n) Vol. 1, p. 341 *et seq.*

(p) 5 Madd. 118.

(r) 1 Sim 534.

(t) 2 You. & C. 636.

* 533 *and an executory trust is recognized in many cases, and is simply this; that the former is created and executed by the instrument which passes the legal estate to the trustee; the latter is to be executed by the trustee whom the donor appoints to carry his intention into effect, or by a Court of Equity; which, in cases where full effect cannot be given to the intention, as being inconsistent with the rules of law, will give effect to it as far as those rules will admit. *Humberston v. Humberston*, (a) *Papillon v. Voice*, (b) *Hopkins v. Hopkins*, (c) *Countess of Lincoln v. Duke of Newcastle*, (d) *Wheate v. Hall*, (e) *Brewster v. Angell*, (g) *Higginson v. Barneby*, (h) *Lord Dorchester v. Earl of Effingham*, (i) *Woolmore v. Burrows*, (k) *Mortimer v. West*, (l) *Hill v. Hill*, (m) *Lindow v. Fleetwood*, (n) *Tollemache v. Earl of Coventry*, (o) *Bankes v. Baroness Le Despencer*, (p) *Ommancey v. Butcher*. (q)

It is clear from these cases that there can be no reasonable difficulty in settling these estates so as to continue them in the family as the testator wished. It was suggested in the Court below, that the old settlement made by the grandfather should be taken as a model; but T. A. Knight has dealt with the estates in a manner that was not in accordance with the intention of that settlor, or of R. P. Knight; for by the deeds of 1825 he made his son tenant in tail, instead of giving him a life-estate. The estates should be limited in strict settlement, on the principle that estates for life should

* 534 *be given to all the male descendants of the grandfather who were living at the death of the testator R. P. Knight, with limitations in tail male to their then unborn issue, respectively and successively. That form of settlement must have been in the view of the Court in mak-

(a) 1 P. Wms. 332.

(b) 2 P. Wms. 478.

(c) 1 Atk. 593; see 2 Jac. & W. 18, n. b.

(d) 12 Ves. 218-227, 230-238.

(e) 17 Ves. 80.

(g) 1 Jac. & W. 625.

(h) 2 Sim. & Stu. 516.

(i) 3 Beav. 180 n.

(k) 1 Sim. 512, 525.

(l) 2 Sim. 282.

(m) 6 Sim. 144.

(n) 6 Sim. 152.

(o) 2 Cl. & Fin. 611.

(p) 10 Sim. 576-590.

(q) Turn. & R. 270, 271.

ing the first decree in the cause, as appears by the inquiries thereby directed. Whether, in framing the proposed settlement, the tenants for life should be unimpeachable of waste, and have powers of leasing, are questions for the consideration of the House. The cases on them are, *Leonard v. Earl of Sussex*, (a) *Bastard v. Proby*, (b) *Wright v. Atkins*, (c) *Woolmore v. Burrows*, (d) *Bankes v. Le Despencer*. (e)

Some doubt was suggested in the Court below whether the words of R. P. Knight's will would not create a perpetuity; and if this was a direct trust, there would be ground for the doubt; but the proposed settlement will model the trust so as to bring the devolution of the property within the rules of law. *Lord Dorchester v. The Earl of Effingham*, (g) *Humberston v. Humberston*. (h)

It is, on the whole, submitted, that according to the true construction of the will of R. Payne Knight, the devise and bequest of his real estates and of the residue of his personal estate to T. A. Knight were made subject to an executory trust, which T. A. Knight ought to have carried into effect by a strict settlement, conveying and assigning the real estates and residuary personal estate in such manner as best to secure the continuance and enjoyment of them to the male descendants of Richard Knight the grandfather, * as * 535 long as the rules of law and equity would permit. The appellants, being the next male descendants, are therefore now entitled to, and ought to have conveyed and assigned to and in trust for them, estates and interests for their respective lives successively according to their respective seniorities, with such remainders or limitations and trusts over to or for the benefit of their respective issues male, and with such further remainders or limitations and trusts over, as may best answer and secure the purposes of the will. (i)

(a) 2 Vern. 525.

(b) 2 Cox, 6.

(c) Turn. & R. 148.

(d) 1 Sim. 528.

(e) 7 Jur. 210.

(g) 3 Beav. 180 n.

(h) 1 P. Wms. 832.

(i) *Mr. Humphry* proposed a form of settlement, containing limitations and trusts as follows:—

1st. As to the real estates:

To John Knight (appellant) for his life, with the usual limitation to

* 536 As to the estates to be so settled, it appears * by the will that the trust was meant to extend to the whole of the testator's estates real and personal (with the exception of the reservations in his will mentioned). If any uncertainty should be considered to exist, whether his residuary personal estate, or even some parts of the real estates which may not have devolved to him from his grandfather, were intended to be subjected to the trust, such uncertainty, if considered as affecting the residuary personal estate, could not invalidate the trust as regards the real estates; or if considered as affecting any parts of the real estates as may not have devolved to him from his grandfather, could not affect or invalidate the trust as regards the other certain and ascertainable parts of the real estates, to which such trust would clearly apply.

trustees to support contingent remainders; remainder to his eldest son F. Winn Knight for his life, with the usual limitation to trustees to support, &c.; remainder to his first and other sons successively according to seniority in tail male; remainder to C. Allanson Knight (second son of the said J. Knight) for his life, with the usual limitation to trustees to support, &c.; remainder to his first and other sons successively according to seniority in tail male; remainder to E. Lewis Knight (third son of the said J. Knight) for his life, with the usual limitation to trustees to support, &c.; remainder to his first and other sons successively according to seniority in tail male; remainder to all the sons of the said J. Knight, born after R. P. Knight's death, successively according to seniority in tail male; with remainders over in a similar form and manner to Thomas Knight (respondent) for his life, and to his sons *in esse* at the time of the death of the testator Richard Payne Knight, for their respective lives, and to their respective first and other sons in tail male; and to the sons of the said T. Knight thereafter born in tail male, and with the usual intervening limitations to trustees to support contingent remainders after each life-estate; with the ultimate remainder to the right heirs of, or other parties entitled under, Thomas Andrew Knight.

2dly. As to the personal estate:

The trusts thereof to be made to correspond with those of the real estates, with a proviso that such personal estate should not vest absolutely in any person entitled to the real estates as tenant in tail male, until such person should attain the age of twenty-one years, or die under that age, leaving issue male surviving him; with an ultimate trust for the executors or administrators of, or other parties entitled under, Thomas Andrew Knight.

The Solicitor-General and *Mr. Tinney*, for the respondents of the first class. (a) — It has been contended by the appellant's counsel, that a trust is raised on the face of this will; that it is an executory trust; and they propose a form of strict settlement for carrying it into execution. It is not necessary to follow them through the vast number of cases they cited, nor to controvert many of the propositions they extracted from them. It must be admitted that if the testator created an executory trust, it shall be carried into effect, whatever may be the difficulty or difference of opinion as to the mode of effecting it. The first question therefore is, does the will create a trust, or did the testator intend it? And in order to discover the testator's intention and arrive at a true construction, the House may look, not only to every * part of the will, but also to the state of the testator's * 537 property and family at the time he made it.

It has been argued that the principle of the old decisions, raising trusts upon precatory words, has been so long and universally recognized and acted upon, that though it has been sometimes disapproved of, no Court, not even this House, would venture to subvert it. That proposition may be conceded; but for the same reason, it is submitted that the principle of the rule is not to be extended. There are several cases, in which, although the rule was upheld, the policy of it was questioned, and a disposition shown rather to contract than extend it. In *Wright v. Atkins*, (b) the decision of Sir W. GRANT, that the devise to Mrs. Atkins "and her heirs for ever, in the fullest confidence that she would at her death devise the property to the testator's family," gave her a life-estate only, was clearly contrary to the intention; but that learned Judge thought he was bound by the principle of the decisions in *Chapman's Case*, (c) *Counden v. Clerke*, (d) and *Crossley v. Clare*. (e) Sir W. GRANT's decree was, for the same reason, affirmed by Lord ELDON; (g) but his Lord-

(a) *Mr. K. Parker* and *Mr. Hodgson* also appeared for some of those respondents; *vide infra*, p. 544. The respondents of the second class (see p. 525, *ante*) did not appear on the appeal at all.

(b) 17 Ves. 255.

(c) *Dyer*, 333.

(d) *Hob.* 33.

(e) *Amb.* 397.

(g) 19 Ves. 299.

ship, on granting an injunction to restrain Mrs. Wright from cutting timber on the estate, said, (a) "This sort of trust is generally a surprise on the intention; but it is too late to correct that." "Conceiving these cases upon words of hope, confidence, &c., to be generally decided against the intention, I have endeavoured to raise a distinction in the defendant's favour, but cannot. I do not believe the testator * 538 intended a mere trust." Those orders of * Sir W.

GRANT and Lord ELDON were reversed in this House; and both Lord ELDON and Lord REDESDALE came to the conclusion, after a great deal of consideration, that Mrs. Atkins took an estate in fee, unimpeachable of waste. (b) In *Meredith v. Heneage*, (c) Lord Chief Baron RICHARDS says, in reference to the words of Mr. Heneage's will, "Do they impose a trust on Mrs. Heneage, and are they imperative on her with respect to the disposition of the property; or do they import more than the wish of the testator, &c., leaving it to her own option, however, to deal with it as her own?" "But I hope to be forgiven, if I entertain a strong doubt whether in many, or perhaps in most of the cases, the construction was not adverse to the real intention of the testator." "In considering these cases, it has always occurred to me, that if I had myself made such a will as has generally been considered imperative, I should never have intended it to be imperative," &c. In *Sale v. Moore*, (d) Sir A. HART, V. C., said, "the first case that construed words of recommendation into a command, made a will for the testator; for every one knows the distinction between them. The current of decisions has of late years been against converting the legatee into a trustee." In those two last-mentioned cases, it was decided that no trust was created upon the words

(a) 1 Ves. & B. 315, 316; s. c. G. Coop. 111.

(b) Several passages were read from the short-hand writer's notes of their speeches on two appeals to the House in 1823; one against the orders before mentioned, the other against the order of Lord ELDON set out in the report in Turner & Russell, p. 164. For the orders of the House on these appeals, see 55 Lords' Journals, pp. 589, 844.

(c) 1 Sim. 542; see pp. 550-552; s. c. 10 Price, 230; see pp. 265, 266.

(d) 1 Sim. 540.

“recommending and not doubting,” &c., in the latter; and “in full confidence,” &c., in the former. We do * not seek to reverse the old cases, in which the rule * 539 so disapproved of originated, but only to show that the tendency of modern decisions is not to extend, but to narrow the rule.

The question whether a trust was raised in the present case, turns on the construction of the words of the will, regard being had also to the situation of the testator in respect to his family and property. If it were not irregular to cite the opinions of a living author, as has been done on the other side, enough might be found in Mr. Jarman’s notes to Powell on Devises to dispose of this question:—

[THE LORD CHANCELLOR. — However eminent a living author may be, we cannot act on his opinions, but we attend to the authorities to which he refers us.]

The doctrine laid down upon words of recommendation in *Meggison v. Moore*, (a) shows that, as such words are not necessarily imperative, you must, for the true construction of them, consider the subject-matter, the situation of the parties, and what is the probable intention. And in *Morice v. The Bishop of Durham*, (b) Lord ELDON said, that where *prima facie* an absolute interest was given, and the question was whether precatory, not mandatory, words imposed a trust on the person taking that interest, it must be shown that the object and subject are certain, and if neither is certain, the recommendation or request does not create a trust; “for of necessity the alleged trustee is to execute the trust, and the property being so uncertain and indefinite, it may be conceived the testator meant to leave it entirely to the will and pleasure of the legatee.” “Wherever the subject to be administered as trust property, and the objects for whose benefit it is to be administered, are to be found in a will not expressly * creating trust, the indefinite nature * 540 and *quantum* of the subject, and the indefinite nature

(a) 2 Ves. Jun. 632, 633.

(b) 10 Ves. 536.

of the objects, are always used by the Court as evidence that the mind of the testator was not to create a trust; and the difficulty that would be imposed on the Court to say what should be so applied, and to what objects, has been the foundation of the argument that no trust was intended."

There is in the present case a devise of property in fee, and the well-known rule of construction must prevail; namely, that where property is given absolutely in clear terms, to take away that gift or cut it down to a life-interest requires terms equally clear to be used. Have such terms been used in this will, or has it been shown by the appellants that the testator meant to cut down the devise in fee to an estate for life? The House must be judicially satisfied, free from all doubt, that the legal fee was so cut down, before it can hold it to be fettered with a trust. It should have appeared that there was a trust, an executory trust, before application was made to the Court to carry it into effect. Lord ELDON applied that principle in *Wright v. Atkins*, in the passage cited on the other side; (a) and it is most important to notice what he there says on the uncertain description of the words "property" and "family," as the subject and object of an alleged trust.

It is quite certain, on the words of Mr. Payne Knight's will, that no trust was, or was intended to be, created as to any part of his property. A mere wish or recommendation to continue the property in his family, however clearly expressed, would not create a trust. The testator being himself without children, and desirous to constitute a head of

* 541 the * family, he wished that his successors would continue the estates in the family. Did he wish that his successors should be without powers of jointuring or leasing? or that any of them, who might have daughters and no sons, should be without any power to make provision for them out of the estates, but should in that case denude himself of the whole of the property in favour of some remote relation? It is beyond all question that the testator did not intend to impose on his successors any legal obligation to a strict

(a) Turn. & Russ. 157, 158.

settlement of the property; he merely appealed to them not to dispose of it away from the family; and the tying them down by settlement, such as was proposed, would not secure the object of continuing it in the family, inasmuch as the first tenant in tail might get rid of the entail. The testator did not make any reference whatsoever to any settlement, and in most cases of executory trust there is found in the wills an allusion to some instrument to be executed. *Woolmore v. Burrows*, (a) *Ford v. Fowler*, (b) *Lord Dorchester v. Earl of Effingham*. (c) The word "continue," on which the appellants lay some stress, was used in *Mortimer v. West*, (d) and *Lawless v. Shaw*, (e) but no effect was given to it.

But how can any settlement be executed of the property devised by this will, which leaves it quite uncertain what property is to be settled, or on whom, or what estate or interest the parties are to take? And where there is an uncertainty of interest, which is included in the uncertainty of objects, it is impossible to execute a trust. It is no answer to this objection to say that the Court will determine the * quantity of interest. The Lord Chancellor says, * 542 in *Malim v. Keighley*, (g) "You must first see what interest the person to whom the recommendation applies takes;" and the same is said or implied in all the cases in which it was held that there was no trust on account of uncertainty as to the object. *Lechmere v. Lavie*, (h) *Ex parte Payne*, (i) *Harland v. Trigg*, (k) *Shaw v. Lawless*, (l) and *Earl of Stamford v. Hobart*, (m) *Henry v. Hancock*, (n) Jarm. Pow. on Dev. (o) To raise an executory trust on precatory words, clearness, distinctness, and precision of description, both of object and of subject, are essentially necessary, and uncertainty in any of these is fatal to a trust. Can any description of object be more vague than the words, "family,"

(a) 1 Sim. 512.

(c) 3 Beav. 180 n.

(e) 5 Cl. & Fin. 129.

(h) 1 My. & K. 197.

(k) 2 Bro. C. C. 142.

(m) 3 Bro. P. C. 38.

(o) Vol. 1, p. 353 n.

(b) 3 Beav. 146.

(d) 2 Sim. 282.

(g) 2 Ves. Jun. 531.

(i) 2 You. & C. 636.

(l) 5 Cl. & Fin. 129.

(n) 4 Dow, 145.

and “descendants,” and “successors” ? If a trustee or the Court is to execute a trust, there must be three certainties ; what is to be settled in trust, on whom settled, and in what manner. As to the subject in this case, the reason given by the testator for his recommendation does not apply to any part of the property which he had not derived from his grandfather ; and yet the will makes no distinction. If a trust were created, it ought to be confined to the property derived from the grandfather ; and regard being had to the language and the nature of the limitations, it must be restricted to the real estate. There is, at any rate, no sufficient ground for including the personal estate, and especially the testator’s own personal estate, most of which he bequeathed to the British Museum.

The testator explained his views by his own conduct * 543 in cutting off the entail in his grandfather’s estates, and in devising those estates, together with part of his own property, to the persons who would have inherited the grandfather’s estates. He exercised a discretion himself, by giving away some parts of the property to other objects ; and he has left a discretion to his successor expressly as to certain points, such as rewarding old tenants and servants, which is inconsistent with a trust binding the whole property. In giving some legacies, which he called reservations from the rents, he expressed confidence in the integrity and honour of his family to take no technical objection to these gifts. Those words unquestionably applied to the small reservations, and cannot be construed to take away the estates from the persons to whom he had before given them. He, in a subsequent part of the will, “trusts to the liberality of his successors to reward his old servants and tenants ; and to their justice to continue the estates in the male succession.” Can any one for a moment seriously contend that these latter words create a trust ? To whose justice does he trust ? — the justice of all who should succeed him in all time, without limit. As well might it be said that the first part of the sentence created a trust for old servants and tenants, — which is not pretended, — as that the latter part raised a trust for their descendants. The appeal to the liberality and justice of his

successors did not import that any of them should denude himself of the property, or do any act that would require a suit in equity. It is not denied that the rule of raising trusts on precatory words in a will is correctly laid down in the cases of *Pierson v. Garnet* and *Malim v. Keighley*; but these and the numerous other cases which have been cited for the appellants fall far short of what they ask the * House to do, to grant which would be extending * 544 the rule even beyond the principle of the old decisions.

It should not be forgotten (supposing the language of the will to be imperative) that a settlement was executed by Mr. T. A. Knight by the deeds of 1825, in conformity with the expressed wishes of the testator; and if T. A. Knight the younger had lived or left a son, the questions raised in this appeal could not have occurred. In the event that has happened, the respondents, and not the appellants, are entitled under those deeds, as well as under the will of T. A. Knight.

[*Mr. Kenyon Parker* said he was instructed on behalf of Mrs. Walpole, one of the respondents, to support the decree; but as it appeared that her interest was sustained by the counsel who were heard for other respondents, the Lords declined to hear him.]

Mr. Pemberton Leigh, in reply. — The main argument for the respondents is, that to raise a trust upon precatory words, there must be such certainty of subject and of object, and also of interest, pointed out by the instrument of gift, that the trustee may be able to execute the trust without the assistance of a Court. That is new doctrine; such a degree of certainty is inconsistent with the established rule. Why should more certainty of subject or object be required in a trust raised by precatory words than in direct trusts? No such certainty is required by the Courts in the construction of instruments. If, from the words of the instrument, it can be collected that the testator intended to create a trust, that intention will be carried into effect. In *Jones v. Morley*, (a)

(a) 12 Mod. 159.

Lord HOLT says it is not necessary in declaring a use in equity, if there be a transmutation of possession, to use the word "use;" any word by which the party's mind may be known is sufficient. And in order to create a trust, all that is necessary is to show, first, that the person to whom the property is given is not to take the whole; or, secondly, that a beneficial interest in it is given to one person, with the ulterior benefit to others. In none of the numerous cases collected in Jarman's *Powell on Devises*, (a) or in White's edition of *Roper on Legacies*, (b) and before referred to, was there such certainty required as the respondents' counsel allege. The certainty of subject and of object required to constitute a trust on precatory words is that degree of certainty that will enable the Court to determine them as if the testator himself had declared them; and that is the scope of the rule as laid down by four eminent Judges, — Sir WILLIAM GRANT, in *Parsons v. Baker*, (c) Lord ELDON, in *Tibbits v. Tibbits*, (d) Sir T. PLUMER, in *Ommaney v. Butcher*, (e) and the present Lord Chancellor of Ireland, in *Phillips v. Eastwood*. (g) The respondents, notwithstanding, insist that there must be a clear certainty, and no discretion left to the donee. It is true no discretion is to be left to him to dispose of or to diminish the property; but he may have a discretion to select the persons, the objects of the trust. *Roper on Legacies*, (h) *Eales v. England*, (i) *Massey v. Shearman*, (k) *Malim v. Keighley*, (l) *Brown v. Higgs*. (m) The rule to be collected from these cases is, that where a testator points out a class of persons out of whom the trustee is to select, if he does not select, the trust still remains. The trust is raised if it appears that a beneficial interest is to go to the first donee. *Harland v. Trigg*, (n) as explained by Lord ELDON in *Wright v. Atkins*. (o) There

(a) Vol. 1, p. 348 *et seq.*

(c) 18 Ves. 478.

(e) Turn. & Russ. 270.

(h) Vol. 1, p. 273 (3d ed.).

(k) Amb. 520.

(m) 4 Ves. 708.

(o) G. Coop. 122.

(b) Vol. 1, pp. 373, 388.

(d) 19 Ves. 664.

(g) Lloyd & Goold, 297.

(i) Prec. Chan. 200.

(l) 2 Ves. Jun. 335.

(n) 1 Bro. C. C. 142.

was no decision in *Wright v. Atkins*, that a trust was not created. The decree pronounced at the Rolls, and affirmed by Lord ELDON, (a) declaring a trust to have been created by the words of confidence used by the testator, was not shaken, in that respect, on the appeal to this House, where so much only of the judgments below as declared Mrs. Atkins to have taken an estate for life only was reversed ; this House declaring that she took an estate in fee, but that it was premature to decide the ultimate trust until after her death. The rule, as qualified by Chief Baron RICHARDS in *Meredith v. Heneage*, (b) and which was taken by him from the judgment of Lord ALVANLEY in *Malim v. Keighley*, must govern the decision in this case. The ultimate decision in *Meredith v. Heneage* rested on the words, "free and unfettered," added to the gift. In this case the testator uses no such words, but says: "And I do hereby constitute and appoint the person who shall inherit my said estates under this my will, my sole executor and trustee to carry the same and every thing therein contained into execution." If the testator intended that the first donee of this property should take it absolutely, why should he call him a trustee? These words could not be confined in their application to the pecuniary legacies that immediately precede them ; they apply expressly to every thing contained in the will. The words in this and other parts of the will, indicating a desire that the property should go in the direct male line to the descendants of the grandfather, amount to a command, *according to * 547 the rule deduced from the cases before referred to.

And in the clause bequeathing the articles of *virtu* to the British Museum, the testator makes it a condition that the same descendant, the representative of the family, should be made an hereditary trustee of the museum, "to be continued in perpetual succession to his next descendant in the direct male line." The testator having so indicated his desire, and designated the class of persons to succeed to the property, concludes, trusting to the justice of his successors to exercise such a disposition of the estates as will continue them in the

(a) 17 Ves. 255; 19 Ves. 299.

(b) 1 Sim. 548.

male succession of the family. There can, from these clauses, be no doubt of the objects of the trust. The class of persons who are to take is clearly designated ; and it is inconsistent with the will to dispose of any part of the property in favour of females. It was argued that it could not be the testator's intention to exclude the daughters of T. A. Knight, in case he should leave no son ; but, in fact, they were passed over by the testator, and they could not take any part of this property if their father had died intestate : an executory trust was clearly created, and though the testator did not point out, as he might not himself have known, the manner of carrying it into execution, the Court will give effect to the intention, by directing the person who is in possession to be a trustee to carry it into execution.

September 4, 1844.

THE LORD CHANCELLOR. — The question in this appeal, which was argued before your Lordships in the last session, arose upon the will of the late Richard Payne Knight. He had succeeded to a large real estate and to considerable personal property under the will of his grandfather * 548 Richard Knight. These, with other real * estates and other personal property, he bequeathed “ to his brother Thomas Andrew Knight, should he be living at the time of his, the testator's, decease, and if not, to his son Thomas Andrew Knight the younger ; and in case he should die before the testator, to his eldest son, or next descendant in the direct male line ; and in case he should leave no such descendant in the direct male line, then to the next male issue of the testator's said brother, and his next descendant in the direct male line ; but,” he adds, “ in case no such issue or descendant of my said brother or nephew shall be living at the time of my decease, to the next descendant, in the direct male line, of my late grandfather Richard Knight, of Downton, according to the purport of his will, under which I have inherited these estates, which his industry and abilities had acquired, and of which he had, therefore, the best right to dispose.” This property so bequeathed was given in fee.

The will, in a subsequent part of it, contained this clause :

[462]

"I trust to the liberality of my successors to reward any others of my old servants and tenants, according to their deserts; and to their justice, in continuing the estates in the male succession, according to the will of the founder of the family, my above-named grandfather, Richard Knight."

The question is whether by the words, "I trust to the justice of my successors, in continuing the estates in the male succession," &c., a trust was created; or whether the testator intended to leave a discretion in the persons whom he calls his successors, with respect to the disposal of their property. The law upon questions of this nature is well laid down by Lord ALVANLEY in *Malim v. Keighley*: (a) "Wherever," * he says, "any person gives property, and * 549 points out the object, the property, and the way in which it shall go, that does create a trust, unless he shows clearly that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it."

I have shared the doubt expressed by the Master of the Rolls in his judgment in this case; (b) but I have come to the conclusion, upon considering the whole of the will, that the testator had no intention to create a trust; that no trust has in fact been created; and that it was in the discretion of the devisee, Thomas Andrew Knight, to dispose of the property as he should think proper. I do not think that the testator intended to control his successors in the disposal of the property, but to leave the whole to their discretion. In the very clause in question, the testator "trusts to the liberality of his successors to reward any others of his old servants and tenants, according to their deserts." This, it is clear, does not raise a trust; it creates no legal obligation; and when the testator, therefore, goes on and expresses his trust in "their justice, in continuing the estates in the male succession, according to the will of the founder of the family," it would be difficult to suppose that he intended to create a different description of obligation. He had himself suffered a recovery of the estate to which he had succeeded under the will of his grandfather, and thereby converted the entail into

(a) 2 Ves. Jun. 335.

(b) 3 Beav. 175 *et seq.*

an estate in fee-simple. By his will he disposed of this to the nearest male descendant of his grandfather, who should be living at his own death. He then gave him the
* 550 power of acting as he himself had * done in further-
ance of his grandfather's view ; and he might, and probably did, suppose that this mode of disposing of the property would be more effectual for that purpose than any special limitation of it that the law would permit.

Another observation arising out of the clause is, that it is not confined to his immediate successors, but is without limit: as he must have known that such an injunction could not be imperative on his successors generally, he must, I think, have meant it as a mere suggestion, applicable in the same way to his immediate as to his more remote successors, and not intending thereby to fetter their discretion as to the disposal of the property.

Another argument in support of this view arises out of the language of the clause as to the property to which it refers. It is not clear to what it applies. By the use of the word "continuing," it would seem to be confined to the estates which the testator took from his grandfather ; but this is by no means clear. It is doubtful, too, whether it includes the personal as well as the real estate. This vagueness is not inconsistent with the intention that every thing should be left to the discretion of the successors, but is not easily reconcilable with the intention of imposing a positive obligation upon them.

This obscurity, as to the property to which the clause was intended to apply, and the circumstance that an indefinite portion of the personal estate was subject to be disposed of according to the liberality of his successors, raise another difficulty in the way of considering this as an imperative trust.

Then as to the nature of the estate to be taken in the property, supposing the property itself to be sufficiently
* 551 ascertained, what is there to guide the Court * in determining it? The testator has said nothing upon the subject. This affords a further reason against the supposition that the testator intended to impose an imperative

obligation on his successors as to the settlement of the property.

Referring then to the rule stated by the learned Judge (Lord ALVANLEY) to whom I have referred, there is, I think, too much uncertainty in this disposition to admit of a trust being raised in the devise with respect to any part of the property in question; and considering the terms that the testator has used, in connection with the other circumstances to which I have adverted, I am persuaded he had no intention to do so. I recommend your Lordships, therefore, to affirm this judgment.

LORD BROUGHAM.—I heard the argument in this case, and I take the same view of it as that which has been expressed by my noble and learned friend. With respect to the precatory words, I had some doubt at first, but on further looking into the case these doubts have been removed; and on the whole I agree with my noble and learned friend in thinking that this judgment ought to be affirmed.

LORD COTTENHAM.—I concur in thinking that the decree in this case ought to be affirmed. I adopt the rule as laid down by Lord ALVANLEY in *Malim v. Keighley*, and I think this case comes within the exception he there lays down: his words are thus reported: “Wherever a person gives property, and points out the object, the property, and the way in which it shall go, that creates a trust, unless he shows clearly that his desire expressed is to be controlled by the party, and that he is to have an option to defeat *it.” * 552 “If a testator shows his desire that a thing shall be done, unless there are plain express words or necessary implication that he does not mean to take away the discretion, but intends to leave it to be defeated, the party shall be considered as acting under a trust.” (a)

I will not consider whether the testator has sufficiently described the property, or expressed the way in which it should

(a) 2 Ves. Jun. 835.

go ; because, assuming that he has done so, I think there is sufficient upon the face of this will to show that he did not intend to take away from the devisee the discretion of defeating the devise he expressed. Having by his will expressed his sense of the justice of continuing the estate in the male succession, according to the will of his grandfather, it must be assumed that he conceived the obligation to be binding on himself ; and how did he perform this duty ? He had a brother, and that brother had a son at the time he made his will : but so far from himself limiting the succession of the estates according to the will of his grandfather, he gives absolute estates to his brother, and to his brother's son, but only in the event of his brother not being alive at the time of his own death ; and he makes provision in terms for the next descendant in the male line of his grandfather, only in the event of there being no issue male of his brother at the time of his own death. Such next descendant, in the direct male line, of his grandfather was to take according to the purport of his (the grandfather's) will ; but there was no such direction as to his brother or his brother's sons. He, no doubt, assumed

that the sons of his brother and their issue male would
* 553 in due succession enjoy the property ; but * not doubting but that such would be the case, he took no means to secure it, unless the provision at the close of his will had that effect ; and if it had, all would have taken immediate interests in remainder under the will, and not absolute interests, such as he gave to his brother and his brother's son in certain events.

It is an observation incident to all trusts created by precatory words, that the testator might, if he had intended, have created an express trust ; but there is a peculiarity in this case which seems to give peculiar force to that observation : the testator must have been aware of his own legal power over the property, obtained by his own act (the recovery he had suffered), but he felt bound by a moral obligation to give effect to the supposed wishes of his grandfather. To effect that he must have intended either to subject his successors to the same moral obligation and so to effect his object through

their acts, or to secure it by his own. The provisions of his will are precisely calculated for the first purpose, but are inapplicable to the second. An act which is to depend upon the sense of justice of another must be discretionary in the person from whom it is to proceed. In ordinary cases the testator must be supposed either to have considered his recommendation as equivalent to a command, or as imposing a condition upon the gift; both of which exclude the idea of discretion, which is in the present case necessarily implied.

This construction is, I think, strengthened by the clause which relates to the donation he gave to the poor and others out of his estate; he intended that those directions should be imperative, and with this view he declared "that the person who should inherit his estates under his will should be his sole executor * and trustee, to carry the same and * 554 every thing contained therein duly into execution."

But apprehending that there might be some technical inaccuracies fatal to the legal validity of these gifts, he in that case expresses his "confidence in the approved honour and integrity of his family to take no advantage of any such technical inaccuracy, but to admit all the comparatively small reservations he had made out of so large a property, according to the plain and obvious meaning of his words;" terms very similar to those by which he expresses his wishes as to the line of succession to his estates, but very different from those in which he gives directions which he intended to be imperative.

I think, for these reasons, that the testator contemplated, and, in the words of Lord ALVANLEY, intended that the desire he expressed should be subject to the control of those who might succeed to his estates, and liable to be defeated at their discretion and option; and consequently that the judgment of Lord LANGDALE was right, and ought to be affirmed.

LORD CAMPBELL. — Having been counsel in this case, I have regarded my own opinion upon it with a good deal of distrust, although that opinion was very strongly in favour of the decree; but now, having heard the opinions of the noble and

learned Lords who have preceded me, I have no hesitation in saying that I do not entertain the smallest doubt that the decree was right; feeling strongly that the testator had not the remotest notion that there was to be any resort to a Court of Justice to keep the estate in the family, but that those precatory words were considered by him as intimating what he desired that the settlement should be. I can
* 555 hardly say that that is * a strict settlement, because that is not at all the model on which such a settlement should be framed. It has caused great confusion in this particular case, and might tend, I think, to unsettle the law upon the subject. I therefore heartily concur in the motion, that the judgment be affirmed.

THE LORD CHANCELLOR. — I think the costs are provided for by the will.

Mr. Humphry. — The doubt expressed by Lord LANGDALE arose upon the terms of the will; (a) and in such circumstances the costs of litigation should be paid out of the property.

THE LORD CHANCELLOR. — Is there not a provision in the will for the costs, in case it should come to the House of Lords?

Mr. Hodgson. — That is in the will of Thomas Andrew Knight. Hitherto each party has paid his own costs.

THE LORD CHANCELLOR. — Lord LANGDALE expresses great doubt. It is a question arising on the will.

LORD CAMPBELL. — Where a will is so worded as to render litigation almost inevitable, it is hard that parties should be involved in it at their own costs.

LORD BROUGHAM. — The rule in the Court of Chancery is,

(a) 3 Beav. 175 *et seq.*

that where the will raises a doubt, you make the estate pay the costs of the litigation.¹ The question arose out of the will in this case.

The decree was accordingly affirmed, and the appeal dismissed.

* BYRON v. COOPER.

* 556

1844.

JOHN BYRON, JOHN BLADES, JOHN CROSS,	}	<i>Appellants.</i>
JOSEPH COULAM, ROBERT CHATTERTON, ROBERT DAWSON, WILLIAM TEAL WELFITT,		
THOMAS GRANTHAM and CHARLES HILL .		
The Rev. THOMAS LOVICK COOPER, Clerk .		
		<i>Respondent.</i>

Tithes. Statute. Pleading. Modus. Practice.

A bill for an account of tithes was filed against five defendants, before the expiration of the time limited by the Act 2 & 3 Will. 4, c. 100, § 3; and, after the expiration of that time, was amended under orders of the Court, and four other persons were introduced as defendants.

Held, that the suit, as against these latter defendants, must be taken to have commenced at the date at which they were actually introduced into the bill; that they could not, by relation backwards, be treated as defendants to the original bill; and that they were consequently entitled to the protection of the provisions of the statute.

A decree against these defendants for an account, made in the Court below, was therefore reversed in this House; and the bill, as to them, ordered to be dismissed, with costs here and in the Court below.

In a bill for tithes, the defendants set up a *modus* for outners (persons dwelling out of the parish, but holding lands within it) to pay 4d. per acre for all ancient pasture-land.

Held, that such *modus* was good in law.

The validity of this *modus* having been established, the rector was allowed

¹ Bowditch v. Soltyk, 99 Mass. 136, 141; Sawyer v. Baldwin, 20 Pick. 388, 389; Rogers v. Ross, 4 John. Ch. 608; Irving v. De Kay, 9 Paige, 94; 2 Dan. Ch. Pr. (4th Am. ed.) 1426, 1427.

to take an issue to try whether it applied to ancient pasture-lands which, after being meadowed or ploughed up within the time of legal memory, were reconverted to pasture : and the House reserved costs and further directions till such issue should have been determined.

February 29; March 1, 8, 28, 29; September 4, 1844.

THE respondent was the rector of the parish of Mablethorpe St. Mary cum Staine (the two parishes having been united about the year 1658), in the county of Lincoln. The appellants were occupiers of lands within that parish. The respondent claimed tithes in respect of those lands.

The appellants set up a claim of exemption from the payment of tithes in respect of such lands, and insisted on an alleged *modus* or customary payment, as the ground of such exemption.

On the 5th August, 1833, the respondent exhibited his original bill of complaint against Byron, Blades, Cross, Coulam, and Chatterton, in the Court of Exchequer; which bill was afterwards amended by two several orders, dated 3d of November, 1834, and 7th March, 1836, under the former of which the other appellants, Dawson, Welfitt, Grantham, and Hill, were made defendants. The bill, as amended, stated (among other things) that the respondent was the rector of the parish; and the appellants held and occupied certain pieces of pasture-land, situate within that part of the parish called Mablethorpe St. Mary, upon which they had fed and depastured divers cows, sheep, mares, and sows, which had produced increase, &c.; and had also depastured barren cattle there for agistment, and that they ought to have set out the tithable matters so arising, but had unlawfully subtracted the same. And the bill — after stating that the appellants pretended that such pieces of pasture-land were and had been exempt from the payment of such tithes, by reason that there was, within that part of the parish known as Mablethorpe St. Mary, an ancient custom, that if any person dwelling out of the parish of Mablethorpe St. Mary occupied or took to farm any pasture ground being ancient pasture lying within such part of the parish, he should pay to the rector for the time being, upon the 1st day of August in every year, the sum of 4*d.* per acre for every

acre of such ancient pasture, and so in proportion for a greater or less quantity; and that the appellants alleged that * they were outners dwelling out of such * 558 parish; that the several closes of land in their respective occupation were ancient pasture-lands; and that they were not liable to pay or render the tithes of such pasture-lands, but were only bound to pay according to such alleged custom — charged that there was not, in fact, any such custom or usage, and that if any such alleged custom had prevailed for any length of time, the same was not an immemorial payment, and had not continually prevailed; that all such pieces of land occupied by the appellants, if they ever were, in fact, ancient pasture, had ceased so to be, inasmuch as all the same had been from time to time by the appellants, as by former occupiers thereof who preceded them, actually converted from pasture, and broken and ploughed up, and converted into tillage, and meadowed, and actually produced crops of grain, &c., by cultivation, for such crops tithes in kind had been rendered or paid for to the rectors of the rectory for the time being, save and except when wrongfully withholden; and that such pieces of land had been subsequently laid down and converted into pasture again, and thereby became and answered the description of, and were in fact called or known by, the name or description of “new converted lands,” or “converted lands,” and the same were not in fact, and did not in any manner answer the description of ancient pasture-lands.

The bill then went on to allege matters as evidence of these charges, and prayed for an account and for payment of the tithes.

The appellants put in answers which, in substance, (a) admitted their occupation of the lands in question; then set up the customary payment or *modus* * al- * 559 ready stated; and further alleged, that if any part of the ancient pasture-lands of the parish, which were well known and easily designated by all persons acquainted with the

(a) Fully set out in the report of the case in the Court of Exchequer, 3 You. & Col. 467 *et seq.*

parish, was ploughed or meadowed, it paid tithe; but that when restored to pasture, it was entitled to the benefit of the *modus*. The answers further alleged payments made according to this *modus* for a period of above sixty years, namely, from 1760, when a person named Gage was rector, and afterwards to his successors, Elliott and Jones; and then stated a tender to the plaintiff of the sums due upon the calculation of the *modus*, up to old Lammas-day, 1831.

The cause being at issue, many witnesses were examined for the appellants, and proved payments under this *modus* for above sixty years before the commencement of this suit, and much documentary evidence was produced on both sides. Among the documents was a terrier of the date of 1703, signed by Mr. Heneage, the then incumbent, who, in describing the revenues of the living, mentioned the *modus* now set up, and used these expressions: "and from outners only, 4*d.* an acre for old land to be paid upon Lammas-day; but in case of non-payment, tithe in kind as inhabitants." The respondent, among other evidence, produced the records of six suits formerly instituted in the Court of Exchequer; and the depositions of the witnesses therein were given in evidence on his part.

The following is a summary of the proceedings in these suits: —

15 C. 2 (1664), Charles Asfordby, the rector, filed his bill against Fitzwilliam Purley and others, for tithes of lands occupied by them within the parish. They set up the *modus* of 4*d.* per acre of ancient pasture-land occupied by outners.

The tithes of such lands in the hands of inhabitants
* 560 were proved to be * 12*d.* an acre. The suit was abandoned by the rector, and he paid Purley 10*l.* for costs.

1676, *Asfordby v. Newcomen*. — By decree of 19th February, 1676, it was ordered that the defendant should pay 4*d.* per acre for ancient pasture, and 12*d.* per acre for new converted land; and it was referred to the Master to say what portions of the lands occupied by the defendant fell under this description.

In June, 1678, another decree was made in the same cause, for an issue to decide two questions: first, the existence of

the custom ; secondly, the quantity and description of the lands held by the defendant within the parish. The jury found for the custom. In May, 1679, a decree was made in complete conformity with this finding.

In Michaelmas term, 1678, there was a suit by the same rector against Nicholas and Thomas Newcomen. The same *modus* was set up in defence. A case was stated for the Court on the legality of the *modus*, which was set up to be a *modus* of 4*d.* an acre for all ancient pasture, and of 12*d.* an acre for all new converted ground. The Court in January, 1681, declared this *modus* to be unreasonable and bad.

In Hilary, 1687, Senhouse Claxton, the succeeding rector, filed a bill against Langton. This was a suit to contest the validity of the *modus* of 4*d.* on account of pasture-land ; that being the only *modus* set up in this suit. The decree in the last case was relied on by the plaintiff's counsel, in answer to the alleged *modus* ; but the counsel for the defendant set up the decrees in the other causes ; and in Michaelmas, 1690, a decree was made dismissing the rector's bill with costs, on the ground that the custom was a good custom.

In Michaelmas term, 1802, Mr. Elliott, the then rector, filed his bill against Holden and others, some of whom were inhabitants of the parish, and some * were outners, * 561 for the tithes of the lands held by them. Holden, who was an inhabitant, alleged a custom to pay the rector 12*d.* an acre in lieu of all tithes of agistment. Hay and Paul, two other of the defendants, who were outners, alleged a custom for foreigners or outners, being the occupiers of the particular lands then in their occupation, to pay the rector 4*d.* an acre in lieu of all tithes of agistment for such lands. And Hay further alleged a custom to pay (in this answer the lands were not described as ancient pasture-lands) in respect of 11 acres of fen-meadow, then in his occupation, the sum of 2*d.* per acre in lieu of all tithes arising thereon. Roberts, another defendant, who was an inhabitant, alleged a custom to pay 12*d.* for each acre of pasture-land, in lieu of tithes of agistment on the same ; and a custom to pay 2*d.* an acre for each acre of fen meadow in lieu of the tithes of hay, &c.

The decree of the Court was against all the *moduses* thus pleaded.

In Trinity term, 1812, the same plaintiff filed his bill against Holland, Mountain, Coulam, Welfitt, Walesby, Hudson, and Bellamy, all of whom were outners and occupiers of land within the parish of Mablethorpe St. Mary, for an account of tithes in kind. They pleaded that there was a custom for outners who occupied ancient pasture ground within the said parish to pay the sum of 4*d.* an acre for every acre of such ancient ground, as a *modus* in lieu and satisfaction of all tithes thereof. The defendants also pleaded a *modus* of 4*d.* an acre for the fen meadow, of which they were occupiers, within the parish; and they pleaded another *modus* as to the lands which they occupied in the parish of Staine. In 1815,

a decree for an account was made as to the alleged * 562 *modus* for fen-meadow in Mablethorpe St. Mary * and in Staine; but as to the *modus* on the ancient pasture-land in Mablethorpe St. Mary, an issue was directed.

After this issue had been directed, Mr. Elliott and his solicitor, Mr. Hamilton, went over the parish and examined many old persons, and made other inquiries, and laid the result of these investigations before Mr. (afterwards Mr. Justice) Taunton. In consequence of the opinion given by that eminent person, Mr. Elliott afterwards abandoned the issue; and, during the remainder of his incumbency, accepted the 4*d.* per acre as a *modus* payment on all the ancient pasture-lands.

Mr. Elliott died in 1824, and was succeeded by Mr. Jones.

The circumstances of the induction of Mr. Jones and of his tenure of the rectory were thus set forth in the appellants' answers, and were established by evidence. They stated that in the year 1824 Mr. Jones, the rector immediately preceding the plaintiff, was inducted, on the presentation of Colonel Waters, to the living of Mablethorpe St. Mary, and that in the succeeding year he was inducted to the living of Lewisham, in Kent; and that some time afterwards Colonel Waters offered the advowson and next presentation of Mablethorpe St. Mary for sale, and the plaintiff,

in the year 1829, commenced a treaty for the purchase thereof, and that thereupon Mr. Jones offered to resign the said living of Mablethorpe St. Mary in favour of the plaintiff, but the bishop of the diocese refused to accept such resignation, or to recognize the transaction; that in the course of that year it was discovered that the living of Mablethorpe St. Mary was rendered void from the time of Mr. Jones's induction to Lewisham in 1825, and that, in consequence, the presentation to the rectory of Mablethorpe St. Mary had lapsed to the Crown; that, * upon this discovery, the com- * 563 pletion of the purchase of the rectory was suspended, and an application was made to the Lord Chancellor to present the plaintiff to the living of Mablethorpe St. Mary, and he was inducted into it in the month of February, 1831. And the appellants said that the plaintiff was so instituted to this rectory without the knowledge of Mr. Jones, who from the time of his induction in 1824 up to April, 1830, received the tithes and other profits of the said living, and in particular the *modus* of 4*d.* per acre for the ancient pastureland; and that the plaintiff, being instituted and inducted as aforesaid into the rectory in February, 1831, demanded and received of the said Mr. Jones the sum of 681*l.* as the value or compensation for the tithes and the *modus* so received by Mr. Jones for five years previously and up to Michaelmas, 1830, and then executed a release for the same; and in manner aforesaid the plaintiff had up to that time received and taken the *modus* or customary payment; and the appellants said that under these circumstances they believed that it was the fact that Mr. Jones had, by the acceptance of the rectory of Lewisham, actually vacated the rectory of Mablethorpe St. Mary; but that he was not aware thereof, during any part of the time that he received the tithes and accepted the *modus*. And they alleged that the *modus* had been received by all former rectors of the rectory, and that the last occasion of the receipt thereof, previously to the time of Hugh Jones, was in the year in which William Elliott died, namely, 1824. To the answers were annexed schedules, setting forth the quantities and descriptions of the lands in the parish held by the appellants.

On the 9th of April, 1839, the cause came on to be heard before Lord ABINGER, Lord Chief Baron, and
 * 564 * was argued on that day and on several subsequent days; and on the 4th of July, 1839, a decree was pronounced therein, whereby an account was ordered to be taken of what was due from the several defendants respectively to the respondent, in respect of all and every the tithes and tithable matters and things demanded by the bill; and the defendants were ordered to pay the costs.

The appellants appealed against the whole of the decree.

The Solicitor-General and *Mr. Bethell*, for the appellants. — There are two questions to be decided in this case, and on both of them the judgment of the Court below has been erroneous. The first relates to the effect of Lord TENTERDEN'S Act; the second to the *modus* set up by the appellants in answer to the respondent's bill, and to the manner in which that *modus* has been alleged.

As to the Statute of Limitations: the original bill was filed, in this case, within a few days of the expiration of the time mentioned in the third section of the 2 & 3 Will. 4, c. 100. It may be assumed, therefore, that the five first defendants can have no defence to the suit on that particular section; but it is quite clear that the bill cannot be maintained as to the four last defendants. They could not be brought in so as to avoid the provisions of the Act, by the effect of relation back to the date of the original bill. The point has not been expressly decided on the statute; but it has been raised and discussed before this House, and a very marked opinion has been expressed upon it. In *Plowden v. Thorpe*, (a) the Lord Chancellor said, (b) "I should have found much difficulty in concurring in an opinion that
 * 565 a defendant, * against whom no proceedings were instituted until January, 1835, could not claim the benefit of the third section of the statute, because the suit to which he was made a defendant by amendment had been commenced against others within the prescribed time;" but his Lordship

(a) *Ante*, Vol. VII., p. 137.

(b) *Ante*, Vol. VII., p. 164.

did not press his observations further, as the bill there was ordered to be dismissed upon the merits. Still the inclination of his opinion cannot be doubted, and there is no authority whatever which would warrant the putting a different construction on the statute.

Then, as to the *modus* itself: the *modus* has been established by the evidence. It is a good *modus*, and has been properly alleged in this suit; and consequently the bill ought to be dismissed upon the merits. A case alluded to by the Lord Chief Baron in judgment fully establishes the principle that such a *modus* may be lawful. That is the case of *Chapman v. The Bishop of Lincoln*, or *Chapman v. Monson*, (a) as it is sometimes called, which decided that there may be a *modus* for tithes of lands when in the hands of outners, though the same lands in the hands of the inhabitants of the parish would pay tithes in full. The questions, then, to be considered are, whether this particular *modus* is a good *modus*, and whether it has been properly alleged in the pleadings. As to both these questions, the answers must be in the affirmative. The old cases produced in proof by the respondent himself fully establish the validity of this *modus*. The only one of them that at first sight appears to be the other way is that of *Asfordby v. The two Newcomens*; (b) but, upon examination of * that case, there can be no doubt * 566 that the decree there proceeded on the ground of the *modus* being alleged to be not merely one of 4*d.* for ancient pasture-lands, but of 12*d.* an acre for all new converted lands; and the Court was not satisfied as to this latter part, and therefore, as the two things had been pleaded as forming one *modus*, decreed the *modus*, as pleaded, to be bad: but the very next case shows that, when the *modus* of 4*d.* an acre for ancient pasture-lands was put forward as a substantive *modus* not connected with any thing else, it was held to be good. Such was the decision in *Claxton v. Langton*, (c) where the previous decree was fully considered by the Court. The decision in the former case proceeded on the assumption

(a) Moseley, 266, 279; Gwill. 679; 2 Eag. & Y. 11; 1 Eq. Cas. Abr. 367, pl. 2; Fitz. 119; 2 P. Wms. 565; Gwill. 679.

(b) *Ante*, pp. 559, 560.

(c) *Ante*, p. 560.

that new converted lands must be taken as new ground, and that to allow a *modus* of 12*d.* an acre there was, in fact, to declare an ancient *modus* in respect of something which was not then in existence, and which might or might not be called into existence at the pleasure of any parishioner; but that reasoning cannot be applied to a *modus* of 4*d.* per acre alleged to apply to ancient pasture-lands. In *Claxton v. Langton* the rector confessed that the custom in fact was proved; but he contended that it was unreasonable in point of law. The Court thought otherwise, and decreed in favour of its validity, declaring that the custom was “a good custom,” and the bill was dismissed.

It is difficult to understand how, after that decree, the *modus* could again be disputed. In 1802, the case of *Elliott v. Holden* (a) occurred; but there the *modus* set up was not that which had before been adjudicated, the lands not being alleged to be ancient pasture-lands, but only pasture-
 * 567 lands; and the other * *modus* of 12*d.* an acre, and a third *modus* of 2*d.* an acre for fen meadow, being also claimed. The decree in that suit cannot, therefore, be treated as an authority against this claim. But in a suit afterwards instituted, the same plaintiff did bring the *modus* on ancient pasture-lands again into question. And what was the result? Mr. Hamilton’s evidence, and the opinion of Mr. Taunton, fully explain the cause of Mr. Elliott giving up the prosecution of that suit, and do not admit of the observation that poverty alone compelled him to surrender what he deemed his rights. All these suits appeared in the evidence of the plaintiff himself, who sought to establish the *modus*. On his evidence alone the bill ought to have been dismissed. But then there came the evidence of the defendants. They showed that the ancient pasture-lands were well known, and were easily distinguishable from the other lands of the parish; and on this matter the proof they adduced was wholly uncontradicted. If the Court below meant that the *modus* might be good, but could only be good for what were ancient pasture-lands, then an issue ought to have been directed to try

(a) *Ante*, p. 560

whether these lands bore that character. Instead of that, the Court below decreed an account, assuming as a fact that the lands held by the appellants were not ancient pasture-lands ; and assuming, at the same time, that they must continuously, and without any interruption, bear that character ; for that any loss or suspension of it would be fatal to the right claimed. These assumptions were unwarranted by the law and by the practice of the Court, and were directly opposed to the evidence. In that respect the decree is erroneous. The first case on this point is that of *Pidsley* * v. *Carew*. (a) In that case, *moduses* of various kinds * 568 were established, and it was distinctly laid down that continuity of pasture was not a necessary ground on which to support a *modus* like the present. *Brown's Case* (b) is a still stronger authority. There a *modus* existed as to the tithe of hay, and it was held that if the close which was subject to this *modus* should be sown with corn, and during the time it was so sown should pay tithes in kind to the parson, still the *modus* would revive when it was again laid down in hay. *Simpson v. Hill* (c) recognizes the same principle ; and *Wilson v. Mason* (d) is a direct authority on the point. There it was decided that an ancient corn-mill is exempt from tithes, and that the using of it for a time, either wholly or partially, as a lead-mill, will not destroy the exemption. The authority of that case has never been questioned, and it must govern the present. So that if the right to the *modus* on lands which had been meadowed, but were afterwards reconverted, was the question before the Court, the bill ought to have been dismissed, or, at all events, an issue ought to have been directed on the single question whether the lands held by the appellants were those which had come within the description of ancient pasture-lands. There can be no doubt that they do come within that description, and have been so treated, not only by the preceding rectors, but by the respondent himself.

The evidence of the arrangement between the present

(a) 1 Wood, 410 ; 1 Eag. & Y. 649.

(b) Godb. 194 ; 1 Eag. & Y. 203.

(c) 1 Wood, 255 ; 1 Eag. & Y. 555.

(d) 2 Gwill. 974 ; 3 Wood, 285 ; 3 Eag. & Y. 1318.

and the late rector shows most clearly that the
 * 569 * former had had the income derivable from the *modus* calculated, and had had it handed over to him as part of the fruits of the living to which he was by law entitled, and which had by mistake been paid to the late incumbent. So that this very respondent himself has received and accepted payments made under this *modus*.

Then, is this a reasonable *modus*? It is a *modus* which is payable on old Lammas-day, in respect of the profit obtained by the use of ancient pastures up to that time. But it will be said that it is not reasonable, because it is a variable *modus*, the lands being sometimes converted to purposes other than those of pasture. But the authorities do not support this objection. The effect of them is given in Mr. Eagle's book on Tithes, (a) where he says: "It is commonly said in the books that a variable payment, or, as it is sometimes called, a leaping *modus*, cannot be supported. The cases are, however, not very numerous in which *moduses* have been overruled upon this ground of objection. . . . It is not necessary that the same land should always pay a *modus*; it may sometimes pay tithes in kind, and sometimes a *modus*, for a *modus* may undoubtedly vary with the thing for which it is to be paid." This *modus* is one which, though attaching to lands of a particular description, is still a parochial *modus*, applicable to all such land in the parish. Upon this branch of the subject all the authorities are collected by Mr. Eagle, who thus expresses the result of them: (b) "But although parochial *moduses* run through the whole parish, yet they are in many cases narrowed in their actual operation, and confined to particular lands by * the contingencies of cultivation and other accidental circumstances.
 * 570 *Moduses* of this description have been already exemplified, in those cases in which the custom attaches upon the land only when it is in the occupation of a particular class of persons, as out-townners or in-townners. . . . A parochial *modus* may be laid to cover a particular description of lands, or the specific produce of land. In cases of this nature, it is perfectly

(a) Vol. 2, pp. 77, 78.

(b) 2 Eag. on Tithes, 99.

obvious that the particular land covered by the *modus* cannot be fixed by the custom, but is known and fixed by something else ; namely, in the case of inhabitant householders, by the number of such inhabitants, which is certain to a common and reasonable extent ; and in the case of *moduses* for out-towners, in-towners, and for lands of a particular description, or the specific produce of land, by reference to the quantity of land in the occupation of the parties who claim the benefit of the custom, which is sufficiently certain, as it is matter of public notoriety. Upon these authorities it is contended that the *modus*, as stated, is perfectly reasonable and legal.

Then comes the objection as to the manner in which this claim of a *modus* is set out upon the record. The same strictness is not required in setting out a *modus* as in pleading a plea at law. Eagle on Tithes, (a) where the case of *Mallack v. Brown* (b) is referred to. *Scott v. Fenwick* (c) is also directly in point. There it was held that where an answer alleges a *modus* in lieu of a particular tithe, and from the evidence it appears that another *modus*, and not the one alleged, is payable in lieu of the tithe in question, the Court cannot direct an issue to try * the latter *modus* ; * 571 neither can it decree the tithes in kind, in opposition to the strong evidence of a *modus*, and will therefore dismiss the bill. The case of *Giles v. Horrex* (d) is stronger than the present. There, upon a cross-bill to establish a *modus* of 4*d.* for every acre of grass cut and made into hay, in lieu of tithe hay, it was objected that the *modus* was illegal, as it was not stated to be “and so in proportion for a greater or less quantity than an acre.” But the Court held it to be well set forth, and directed an issue to try it. The defendant there likewise stated that there were several lands in the parish exempt from tithes, and others whereof the rector was only entitled to a moiety of the tithes, and he alleged a *modus* of tithe hay, except in the lands which were tithe-free, and those for which a moiety of the tithes was payable ; and it was held

(a) 2 Eag. 212.

(b) Ambler, 423.

(c) 3 Gwill. 1250 ; 2 Eag. & Y. 1319 ; 4 Wood, 246.

(d) 1 Gwill. 861 ; 2 Wood, 534 ; 2 Eag. & Y. 151.

that he was not bound to set forth particularly the lands which he alleged were tithe-free, or which paid a moiety of tithes. These authorities fully justify the rule as stated by Mr. Eagle, and show that the *modus* here has been pleaded with all requisite strictness.

Mr. Simpkinson and *Mr. Anderdon*, for the respondent. — The decree in this case must be supported. The case of *Plowden v. Thorpe* (a) is hardly applicable here, the circumstances of the two cases being so entirely different. The decree here was made after the fullest deliberation; it was made after a second suit of *Cooper v. Hewson* had been brought into Court, where the Lord Chief Baron had again to consider the same matters. He was perfectly aware * 572 of the * case of *Plowden v. Thorpe*, which in fact cannot be considered as a decision, but only as a vague intimation of unsettled opinion on the construction of the statute; and applying his best consideration to the subject, the Lord Chief Baron was clearly of opinion that all these defendants were equally liable to answer in the suit.

Then supposing them liable to answer, it is submitted that no sufficient answer has been given to the rector's claim, and that this decree for an account is correct. In the first place, the mode of pleading this supposed custom is objectionable. It is vague and uncertain, and for that reason cannot be made the foundation of a decree. The rule on this subject was authoritatively laid down in *Blake v. Veysie*, (b) where it was held that a party can only succeed in a suit *secundum allegata et probata*; and unless the case proved corresponds with the case laid, the suit cannot be supported, though the party makes out in evidence a case which might be a good one if it had been properly laid in the pleadings. In that case, which was one of this sort, the Court of Exchequer had not directed an issue, but had decreed an account, and the decree was confirmed by this House. That case is in accordance with all the authorities. *Croft v. Ayer*, (c) *Gillibrand*

(a) *Ante*, Vol. VII., p. 137.

(b) 3 Dow, 189.

(c) 4 Wood's Decr. 361; 4 Gwill. 1825; 8 Eag. & Y. 1361.

v. *Scotson*, (a) *Wood v. Wray*, (b) *Markham v. Smyth*, (c) *Scott v. Allgood*, (d) and *Lake v. Skinner*. (e)

* But even if properly set out on the pleadings, this * 573 supposed *modus* is bad in law. It was so declared in the suit of *N. and T. Asfordby v. Newcomen*; (g) and if it was a bad *modus* in the reign of Chas. 2, it cannot, as a *modus* by prescription, have become a good *modus* since. The word "ancient" cannot be treated as a nullity, nor can pasture-land which is ploughed up at one time, and recon-verted at another, be treated as ancient pasture-land. It loses its character of ancient pasture-land, by being put under the plough. The authority of these cases is not impeached by that of *Chapman v. The Bishop of Lincoln*; (h) for there the custom was not claimed in respect of a particular class of pasture-lands, but of all the pasture-lands in the parish.

[LORD COTTENHAM. — The cases of *Asfordby v. Newcomen* and *Claxton v. Langton*, though under somewhat different names, seem to have been referred to there. How do you distinguish *Claxton v. Langton* from the present case?]

In that case, nothing turned on the question of particular pastures in a parish being exempt from tithes, as ancient pastures. To make out the claim of *modus*, even supposing the manner of pleading it to be sufficient, the appellants must show that the pastures here are ancient, and have been continuously used as pastures. The claim here is one which more requires to be precisely ascertained than does that of the exemption of orchards or gardens; for they must have certain limits of themselves, but pastures, and especially those claimed as ancient pastures, must be set out by metes

(a) 4 Price, 267; 3 Eag. & Y. 839; 1 Wils. Ex. Rep. 113; 1 Daniel, 27.

(b) 2 Eag. & Y. 436; 3 Anst. 838.

(c) 11 Price, 126; 3 Eag. & Y. 1071.

(d) 2 Anstr. 16; 4 Gwill. 1369; 3 Eag. & Y. 1372.

(e) 1 Jac. & W. 9; 3 Eag. & Y. 976.

(g) *Ante*, p. 560.

(h) Mosley, 266, 279; 2 Eag. & Y. 11; 1 Eq. Cas. Abr. 367, pl. 2; Fitz. 119 (*nom. Monson v. Chapman*); 2 P. Wms. 565; Gwill. 679.

and bounds, for they are not of themselves distinguishable from other lands. The cases already cited go to the
 * 574 full length * of this proposition. That of *Simpson v. Hill*, (a) relied on by the other side for a different purpose, is an authority to the same effect.

[LORD BROUGHAM. — That case is not much in point. The Court there said nothing of the mode of pleading the matter. It was in fact pleaded so, but the Court did not express any opinion on that point. If you set forth a farm *modus*, you must show the boundaries of the farm, but not so when you set forth a parish *modus*; there it is sufficient to show, on the evidence, to what part of the parish it applies.]

Then as to the change in the character of the land: The case of *Wilson v. Mason* (b) has been relied on by the other side, but is not applicable here. It may be admitted that a thing will not lose its peculiar character by merely being applied for a time to a different purpose from that for which it was originally designed, and such was the case of the ancient corn-mill converted for a time to the purposes of a lead-mill; but if that character is destroyed by a change in the subject-matter, as is the case with pasture converted into arable land, the rights which formerly belonged to it in its peculiar character are gone. The case of *N. and T. Asfordby v. Newcomen* is the only proper authority here, and *Claxton v. Langton* does not countervail the doctrine there applied to this claim. The payments here *de facto* made, are not sufficient to support the *modus*; no legal origin for that *modus* can be shown. There is, in fact, no satisfactory proof of the existence of any such *modus* at all. In *Claxton v. Langton* the evidence does
 not support the decree, nor can there be found any
 * 575 proof which really justifies * the allegation that there were any ancient pasture-lands which were subject to such a *modus*. But, at all events, there can be no pretence for saying that the lands which have once been ploughed up

(a) 1 Eag. & Y. 555; 1 Wood, 255.

(b) 2 Gwill. 974; 3 Wood, 385; 2 Eag. & Y. 1318.

or meadowed, can again be deemed ancient pasture-lands, whenever the tenant shall think fit again to convert them into pasture. Neither *Wilson v. Mason* (a) nor *Brown's Case* (b) is an authority for such a resumption of ancient character, by lands which have once been applied to purposes so entirely different from those in respect of which the peculiar character that is to support the *modus* was given them.

Then as to the operation of the statute: So far as the original defendants were concerned, there can be no doubt whatever that the bill was filed in time. The question, therefore, is, whether those defendants have given that proof which will entitle them to the benefit of the statute. The statute requires that there should be proved a payment for two incumbencies, and three years of a third incumbency; and the 8th sect. declares that no presumption shall be allowed nor made in favour of any claim. What is the proof here? The actual payments began in the year 1770, during the incumbency of Gage; not that he was instituted and inducted in that year, for in fact he was instituted in 1759, but that the payments then began. Gage continued incumbent till 1794, when Elliott was inducted; and Elliott was in 1824 succeeded by Jones, the immediate predecessor of the respondent. Taking the evidence, therefore, in the way most favourable for these particular defendants, it does not satisfy the provisions of the statute; for the statute, when it spoke of three incumbencies, meant * three * 576 whole incumbencies, not two and part of a third. But besides this, Jones must be kept out of view altogether, for he never was incumbent during any period when the payment under the supposed *modus* was receivable. His acceptance of the living at Lewisham, which was within six months of his coming to Mablethorpe, vacated *ipso facto* his incumbency at Mablethorpe; and what he did, and his incumbency itself, became therefore immaterial in considering this question.

(a) 2 Gwill. 974; 3 Wood, 285; 2 Eag. & Y. 240.

(b) Godb. 194; 1 Eag. & Y. 203.

[LORD COTTENHAM. — Then you reject all the old causes as evidence of payment?]

Certainly. To bring the case within the statute, payment must be proved within the incumbencies of three individuals preceding the plaintiff in the suit. Then again, a tender of the *modus* will not satisfy the words of the statute; there must be an actual payment, — a payment by one person, and a receipt by another. There is nothing of that sort here; and the facts, therefore, are not such as will bring this case within the operation of the statute, and support this claim of exemption.

Mr. Bethell, in reply. — The *modus* was proved here by the rector himself, and therefore he is not entitled to ask for an issue to try whether it existed. The evidence here establishes the actual payment of the *modus* to Nicholls, Yates, Asfordby, Claxton, Heneage, White, Gage, Elliott, and Jones. Then as to the pleading here: the rule is laid down in *Eagle on Tithes*: (a) “a *modus* laid as a parish custom for orchards or gardens is good, without setting out any description of their boundaries or abutments, or the quantity of land * 577 which they comprise;” and this is * not restricted to orchards and gardens as such, for in another part of the same work it is said: (b) “a *modus* for gardens or orchards generally is a parish *modus*, and is not confined to such as are ancient only, but extends to new gardens or orchards;” and he quotes thirty cases in support of the proposition. These authorities, with those previously quoted, fully establish that the *modus* here has been rightly alleged. Then as to the effect of the statute: it is said that payment to Jones was not one which could be said to fall within the meaning of the Act; for that he was not the lawful incumbent, his incumbency having been avoided under the Statute of Hen. 8, by the acceptance of another living. The answer to that objection is, that he was in possession, and the Act speaks of

(a) Vol. 1, p. 323.

(b) Vol. 2, p. 99.

a person "after institution ;" and there is nothing in the Act which says that payment to an incumbent who has been once legally inducted, a payment made to him in respect of the time during which he did legally hold the living, is not payment within the Act. But further, if the payment under the *modus* was not received by Jones, on the ground that the living ceased to be full from the moment of his acceptance of Lewisham, then there has been a receipt by the plaintiff himself ; for his appointment related back to the time of the avoidance, and by his acceptance of the money from Jones, and his release to Jones, and by the bill itself, he claimed from the time of that avoidance. The *modus* existed at the time of the Act, and there had been a tender and an acceptance of payment under it before 1830.

Lastly, as to the question of fact, which chiefly affects the five first defendants to the bill, that which *relates * 578 to the sixty years, and the three incumbencies : The evidence proves that, with or without contests, payment under the *modus* was received during nine incumbencies ; and as to the sixty years, it is clear upon the evidence that it was received, either without objection, or, what is still stronger, after objection, from 1760 to the present time. The claim is therefore fully made out, and the rector is not entitled to an issue, but his bill ought to be dismissed.

September 4.

LORD BROUGHAM. — My Lords, this was an appeal from a decree of the Court of Exchequer, in a suit for tithes by the Rev. Thomas Lovick Cooper, the present respondent, against, first, the five appellants, Byron, Blades, Cross, Coulam, and Chatterton, with one Riggall, who is no longer in the cause ; and also against four other persons. The bill was originally filed the 5th of August, 1833 ; it was afterwards amended on the 3d of November, 1834 ; and in the amended bill were added the four other defendants, Dawson, Wellfit, Grantham, and Hill. These two dates are very material ; because the Act 2 & 3 Will. 4, c. 100, is by the 3d section made to apply only to suits commenced after the expiration of one year from the end of the then session of Parliament ; the session

of 1832, in which that Act was passed. That session ended the 16th of August, 1832, as appears by the Journals of Parliament: consequently the original bill fell within the proviso, and the first five appellants must defend themselves according to the law as it stood before the Act was passed; that is, before the year 1832. The amended bill was filed fifteen months later; namely, in November, 1834, and con-

sequently the last four defendants have the benefit of
 * 579 the new Act; those * are the four appellants, Dawson, Wellfit, Grantham, and Hill.

The first miscarriage in the Court below, however, was to consider the whole defendants to the suit, the whole nine appellants, as excluded from the operation of the Act. The ground of this opinion was that the bill being originally filed before the 16th August, 1833, and the four last-named appellants being, under an order of the Court of Exchequer, made defendants to that same bill, were as much excluded by the 3d section of the Act as if they had been made originally defendants to the bill filed on the 5th of August, 1833. This is as great and as manifest an error as could well be committed. It is contrary to the whole nature and constitution of a tithe suit, and to the very species of rights which come in question in such a suit. There is no privity whatever between the different defendants. There could be no objection taken for the omission of one or more by the others being made parties to the bill. The defences may be quite separate, and are necessarily quite independent one of the other. One defence may be of a totally different kind from the others. One defendant or class of defendants may set up a former *modus*; one defendant or class of defendants may set up a composition real, which covers his land and none other in the parish. One may set up a defence *de non decimando*, and no *modus* at all, as showing that his lands were abbey lands. In short, it is quite clear that each party may stand in a different relation towards the plaintiff and towards the suit, from all his codefendants.

No more need be said to prove how erroneous is the view taken of the case below, whereby this is considered as
 * 580 one suit and one defence. The parson * is permitted

to add new defendants to his amended bill, in order to save delay and expense; but each defendant so added is to be considered as sued by the proceeding which makes him a defendant, and the date of his being added is the date of the suit's commencement *quoad* him; consequently the four last-named and last-added defendants in this case were only sued in November, 1834, and *quoad* them the bill and the suit bear the date of November, 1834. They do not fall, therefore, within the description of the 3d section of the statute. They are not defendants, to use the words of that statute, "in a suit or action commenced within one year" after the 16th of August, 1832, being the last day of the session in which the Act passed.

Now, no evidence whatever was given which can be pretended to take these four defendants out of the operation of the Act. No tithe in kind had been taken for sixty years, or two whole incumbencies. Their case falls entirely within the scope of the 1st section, and is excluded by none of its exceptions and provisos. As against them, therefore, the bill should have been at once dismissed, and with costs.

We therefore come now to the only question that remains, — the case of the parson's claim against the other five defendants; that is to say, Byron, Blades, Cross, Coulam, and Chatterton (the other four being out of Court); the five defendants, now appellants, who are excluded by a few days from the benefit of the statute.

I must here in the outset observe, that of the many tithe suits of which I have had experience both in Courts of Equity and Law, it has never happened to me to see one in which the evidence for the *modus* was much stronger, — perhaps I ought to say so strong, — * but certainly none * 581 in which it was much stronger, than the case in behalf of the *modus*, and against the parson, which is made by the evidence of the plaintiff himself in this suit. There is set forth, and neither answered nor explained in any way, nor in any manner got rid of, such evidence for the *modus* as really seems nearly if not quite sufficient to set it up and defeat the parson's claim, without any evidence whatever on the part of the defendants; but when added to the parol evidence, and

the particulars proved for the defendants of the last attempt against them, and its abandonment (I allude to the evidence of Mr. Hamilton particularly), the case is left without even the shadow of a doubt.

The *modus* set up is the payment of 4*d.* per acre by all the outners (meaning the out-towners or out-residents, or foreigners, as they are sometimes called), those holding lands in the parish of Mablethorpe St. Mary, but resident out of it, for all ancient pasture-lands, in lieu of all tithe ; and payable at Lammas, and so forth.

By a decree in the Court of Exchequer, made on the 19th February, 1676, in a suit for tithes of the parish, in which the *modus* was pleaded, together with another of 12*d.* for newly converted land (which sum, 12*d.*, seems to have produced a little doubt in the Court below), these two *moduses* were decreed for. In that suit the plaintiff claimed tithes, or composition due for the same ; the decree directed an inquiry into the amount of the land which the composition or *moduses* covered, and witnesses were examined on both sides.

On the 6th of June, 1678, two years afterwards, another decree was made, giving the parson an issue to try
 * 582 these two matters: first, the *modus* set up by the * defendants' pleadings; and secondly, the amount of lands of which it covered the tithes, if it covered any ; for the second issue was as to the extent of the ancient pasture, and of newly converted lands.

On the 22d of May, 1679, a decree was made for these payments. This decree proceeds upon a statement of the issues above mentioned having been tried, and the verdicts having been returned, finding the number of acres, the amount of ancient pasture, and of new converted land ; and also that 4*d.* for each of the former, and 12*d.* for each of the latter, were payable in lieu of all tithes. It also states that the plaintiff's counsel were willing to accept the same compositions ; and those compositions seem not to have been resisted, and to have been decreed accordingly.

A third decree was made on the 11th November, 1680, setting forth the parson's objection to the *modus*, as being unreasonable, and therefore void in law ; and therefore di-

recting a case for the opinion of the Court of Exchequer thereupon, as a question of law, and then the Judges of that Court gave their opinion that the custom was unreasonable and void in law; whereupon a decree was made for payment of tithe in kind. Here it should be observed that the 12*d.* was afterwards set up as well as the 4*d.*

On November 24, 1690, we have a fourth decree of the same Court, in a suit to which the defendants had pleaded, not a *modus* of 4*d.* or 12*d.* for old and new pastures respectively, but simply and only a *modus* of 4*d.* for the ancient pastures; just as is pleaded in the case at bar. This decree sets forth the confession of the plaintiff's counsel, that the custom had been fully proved, and that they only disputed the amount of the tender pleaded, asserting that it was not sufficient * according to the custom of 4*d.* an * 583 acre; that is, that assuming 4*d.* an acre to be the pleaded custom, the tender was not sufficient to satisfy that; and also that they relied on the last decree, declaring the custom as proved to be bad and void in law, and requiring the Court's declaration now, as then, in their favour. But the Court immediately rejected this application; declared the custom as then proved, and now admitted in point of fact, to be good and valid in point of law, and dismissed the bill with costs. The name of the three first cases was *Asfordby v. Newcomen*; the name of the last suit was *Claxton v. Langton*.

In 1815, another decree was made in the suit of *Elliott v. Holland*, directing an account of the tithe due in kind on land not covered by the allowed *modus* of 4*d.* an acre, for ancient pastures belonging to or occupied by outners, and directing a trial at law on the *modus*. The defendants abandoned their *modus*, the *modus* of 4*d.*, as to ancient lands which had been ploughed, meadowed, and again laid down; and the issue never was tried upon the *modus* of 4*d.* (the case now before us) for ancient pasture lands: for a reason given in evidence by the professional gentleman employed by the parson, the plaintiff in the suit, it was abandoned. He swears that he went down to the spot, and examined all the evidence of old people and others, who satisfied him that the

plaintiff had no case; and Mr. Taunton (afterwards Mr. Justice TAUNTON), being consulted on the result of this inquiry, gave a clear opinion against going on with it. Mr. Hamilton says: "I went over the whole parish, and examined very carefully a great number of old persons, and visited every person who was supposed likely to give

* 584 any information relative * either to the *modus* or to the lands called old or ancient pasture. I afterwards made out a statement of the result of my inquiries and examinations, and laid it before Mr. Justice TAUNTON, then practising at the bar." Mr. Hamilton says that he was accompanied by Mr. Elliott, the plaintiff, the parson, in his inquiries and examinations. He produces his statement, and Mr. Taunton's opinion, in evidence. He lastly swears that in consequence of this inquiry and opinion of Mr. Taunton, Mr. Elliott desired him to abandon the trial of the issue, and consented to take the *modus* of 4*d.* an acre; that he continued to take that *modus* all his life; and that there being an arrear of that *modus* after his decease due to him, he, Mr. Hamilton, the witness, received the arrears of the *modus* for his estate, and carried it to the credit of his estate, — he, Mr. Hamilton, being administrator of the estate and effects of Mr. Elliott deceased. Nothing could be more satisfactory than the account given of the abandonment of that suit; and I think Mr. Elliott was well advised by Mr. Taunton so to abandon it. It was abandoned upon that ground; and no one who recollects Mr. Taunton's character, as an able, zealous, and strenuous, and most sanguine advocate, can doubt that this opinion must have been a very clear one, before he recommended the abandonment of that suit.

There is also produced a terrier, signed by the parson Eli Heneage, on the 14th of June, 1703, containing these words: "and from outners only, 4*d.* the acre for old land, to be paid on Lammas-day; but in case of non-payment, tithe in kind as inhabitants;" that is, 4*d.* to be paid by the outners, which is exactly the very *modus* in question. This evidence really seems to leave the case clear enough; but the parol

* 585 evidence * strongly confirms it in all respects. It consists of old persons who carry their testimony back in

favour of the *modus*, from their own personal knowledge, for above sixty years ; and others, from their knowledge by reputation, a great deal longer, going back as far as nearly a century, from persons who had direct personal knowledge of the tithe payments and tithe transactions from their connection with the parties receiving and paying those tithes.

I shall only trouble your Lordships with one or two of these. The first is in the appellants' appendix ; the evidence of Taylor White, seventy-four years and upwards, and who had lived in and known the parish of Mablethorpe St. Mary for sixty-five years. He says that there are within the said parish certain lands called ancient pasture-lands : such lands are well known and clearly distinguished by ditches and drains ; and for those lands, " I think," he says, " the ancient and immemorial usage, general understanding, and reputation within the said parish, is to pay 4*d.* an acre *modus* for tithes of ancient pasture-lands, where such ancient pasture-lands are held or farmed by persons living or residing out of the said parish." He says, " I became acquainted therewith by attending my father, the said Edward White." Who was Edward White, his father ? The tithe collector ; not the tithe-payer's man, but parson's officer. " I attended my father at the tithe feasts and saw him collect money." He saw with his own eyes the 4*d.* paid, and received by the person who collected for the parson.

The next evidence I shall call your Lordships' attention to is that of Joseph Ellis, of Mablethorpe St. Mary, who says he is seventy years of age, and that he has for the last fifty years been acquainted with * the mode of collect- * 586 ing the tithes in the said parish. He says, " The occupiers of the ancient pasture-lands in Mablethorpe St. Mary aforesaid, when residing out of the said parish, paid, in lieu of the tithes of such lands, an annual *modus* or composition of 4*d.* an acre on old Lammas-day ; " and it was the immemorial usage and understanding that such tithes were so compounded for by custom. Now Joseph Ellis says that he has " heard William Simpson, his former master, who died at the age of nearly ninety years, and who was an inhabitant

perfectly satisfied, and will be entitled to a decree with reference to those other lands.

LORD COTTENHAM. — If you do not wish to take your issue as to the other part, you may take an issue limited to those particular lands which have been ploughed up and reconverted.

Mr. Simpkinson. — The plaintiff will take an issue for that.

LORD BROUGHAM. — You have a right, strictly speaking, to an issue upon the whole ; but I think you will do well to advise your clients to confine themselves to that.

* 589 * LORD CAMPBELL. — I must say I entirely concur with the view taken of the case by my noble and learned friend.

LORD COTTENHAM. — The right course will be that *Mr. Simpkinson* should select for the issue a piece of land sought to be affected by the plaintiff's bill.

LORD BROUGHAM. — Then we reserve the costs and further directions.

It was ordered that the decree of the 4th July, 1839, be reversed as to Dawson, Welfitt, Grantham, and Hill, and that the bill be dismissed as against them, with costs ; and that the respondent do pay to these four appellants the costs incurred by them in the Court below : and that the said decree be also reversed as to Byron, Blades, Cross, Coulam, and Chatterton. And the respondent, by his counsel, declining to take an issue as to any other lands than such ancient pasture-lands as have been ploughed up or meadowed and again restored to pasture, it was ordered that his bill be dismissed so far as it demands tithes of any other lands in the occupation of the last-named appellants ; and that an issue be directed to try whether the *modus* of 4*d.* an acre, in the

pleadings mentioned, is payable in lieu of tithes for ancient pasture-lands within the parish, occupied by outners, which, having been ploughed and meadowed, have again been restored to pasture. And as to the five last-mentioned appellants, further directions and costs were reserved. — *Lords' Journals*, 4th September, 1844.

* STOCKTON RAILWAY CO. v. BARRETT. * 590

1844.

THE PROPRIETORS OF THE STOCKTON } *Plaintiffs in Error.*
 AND DARLINGTON RAILWAY }
 CHARLES BARRETT *Defendant in Error.*¹

*Act of Parliament. Construction of "Exportation," and
 "Port." Cumulative Charge.*

The words "shipped for exportation" are not necessarily restricted to an exportation to foreign countries, but may mean exportation in its widest sense ; that is, a carrying out of port.

A Railway Act empowered the proprietors to levy on all coals carried along any part of their line such sum as they should direct, "not exceeding the sum of 4d. per ton per mile." It then went on thus : "And for all coal which shall be shipped on board any vessel, &c., in the port of Stockton-upon-Tees aforesaid, for the purpose of exportation, such sum as the said proprietors shall appoint, not exceeding the sum of one halfpenny per ton per mile."

Held, that with respect to coals shipped for exportation, this was not a cumulative but a substituted toll.

Held also, that the words "the port of Stockton-upon-Tees aforesaid," meant the whole port of that name, and was not restricted to the port of the town of Stockton-upon-Tees ; that there was not such an ambiguity in the enacting part of the Act as to compel a reference to the

¹ These parties came before the House of Lords again upon another point connected with this case, in *Barrett v. The Stockton & Darlington Railway Co.*, 1 H. L. Cas. 17.

preamble of it; and that the word "aforesaid" did not limit the expression to the port of the town as described in that preamble.

Another Act, passed on the same subject, after reciting the former Act, and also reciting that the proprietors had been at great expense in forming inclined planes on the line of railway, authorized them to demand, "for all articles, &c., for which a tonnage is herein before directed to be paid, which shall pass any inclined plane upon the said railway, such sum as the said proprietors shall appoint, not exceeding the sum of 1s. per ton."

Held, that this was a cumulative charge.

Clauses in Acts empowering companies to levy a charge upon the public, as in Railway Acts, for example, must, where the meaning is doubtful, be construed favourably for the public.²

March 26; September 4, 1844.

THIS was an action for money had and received, originally brought in the Court of Common Pleas, to recover three sums of money, which the plaintiff there, Charles Barrett, alleged had been unlawfully received * by the defendants as tolls on the carriage of certain coals carried on the line of the Stockton and Darlington Railway, of which they were the proprietors. The cause was tried before Mr. Justice VAUGHAN at the London sittings after Michaelmas term, 1837, when a verdict was taken for the plaintiff. The facts found were afterwards turned into a special verdict, for the purpose of obtaining the opinion of the Court on the several Acts of Parliament, under the provisions of which the money now sought to be recovered had been demanded and received.

The defendants were incorporated by an Act passed in the 2d Geo. 4, c. 44, (a) for making and maintaining

(a) The preamble to the 2 Geo. 4, c. 44, is as follows: "Whereas the making and maintaining of a railway or tram-road, for the passage of

² If the terms of a charter, when fairly examined and reasonably and justly expounded, fairly admit of doubt as to whether a power, burdensome to the public, has been granted, it cannot be exercised. For cases illustrative of this doctrine, see *Perrine v. The Chesapeake & Delaware Canal Co.*, 9 How. (U. S.) 172; *Head v. Providence Insurance Co.*, 2 Cranch, 127; *Bennett's Branch Imp. Co.'s Appeal*, 65 Penn. St. 242; *Mason v. Boom Co.*, 8 Wallace C. C. 252; 1 *Redfield Railways*, 237, § 64.

*a railway or tram-road, from the river Tees at * 592 Stockton to Witton Park Colliery, with several

wagons and other carriages from the river Tees, at or near Stockton, in the county of Durham, to Witton Park Colliery, in the township of Witton, in the said county of Durham, with five collateral branches from the said railway or tram-road ; one of them commencing, &c., and terminating, &c.; another, &c.; and the other of such collateral branches commencing at or near the river Tees, and terminating at or near the south-west end of the town of Stockton-upon-Tees, in the said county of Durham, will be of great public utility, by facilitating the conveyance of coal, iron, lime, corn, and other commodities from the interior of the county of Durham to the town of Darlington, and the town and port of Stockton, and towards and into the North Riding of the said county of York, and also the conveyance of merchandise and other commodities from the said town and port of Stockton to the said town of Darlington, and into the interior of the said county of Durham, and will materially assist the agricultural interest, as well as the general traffic of that part of the country, and tend to the improvement of the estates in the vicinity of the said railways or tram-roads."

The 62d section was in these terms : " And in consideration of the great charge and expense which the said proprietors must incur and sustain in making and maintaining the said railways or tram-roads, and other the works hereby authorized to be made and maintained ; be it further enacted, that it shall and may be lawful for the said proprietors, from time to time, and at all times hereafter, to ask, demand, take, recover, and receive, to and for the use and benefit of the said proprietors, for the tonnage of all goods, wares, and merchandises, and other things, which shall be carried or conveyed upon the said railways or tram-roads, or upon any part thereof, the rates, tolls and duties herein after mentioned ; that is to say : —

" For all limestone, materials for the repair of turnpike-roads or highways, and all dung, compost, and all sorts of manure, except lime, which shall be carried or conveyed upon the said railways or tram-roads, such sum as the said proprietors shall from time to time direct or appoint, not exceeding the sum of 4*d.* per ton per mile.

" For all coal, coke, culm, cinders, stone, marl, sand, lime, clay, ironstone, and other minerals, building stone, pitching and paving stone, bricks, tiles, slates, and all gross and unmanufactured articles and building materials, such sum as the said proprietors shall from time to time direct and appoint, not exceeding the sum of 4*d.* per ton per mile.

" For all lead in pigs or sheets, bar-iron, wagon-tire, timber, staves, and deals, and all other goods, commodities, wares, and merchandises, such sum as the said proprietors shall from time to time direct and appoint, not exceeding the sum of 6*d.* per ton per mile.

" For all the articles, matters, and things for which a tonnage is herein

* 593 * branches therefrom, all in the county of Durham.

In pursuance of that and subsequent Acts, 4 Geo. 4, c. 33, 5 Geo. 4, c. 48, and 9 Geo. 4, c. 60, there were made a railway, called the Stockton and Darlington Railway, from the river Tees, at the town of Stockton aforesaid, to Witton Park Colliery aforesaid; and a branch railway from the town of Stockton aforesaid to Middlesborough, which is upon the river Tees, about four miles below the town of Stockton and within the port of Stockton-upon-Tees; and a double inclined plane, called the Brussel-

before directed to be paid, which shall pass the inclined planes upon the said railways or tram-roads, such sum as the said proprietors shall appoint, not exceeding the sum of 1s. per ton.

“ And for all coal which shall be shipped on board of any vessel or vessels in the port of Stockton-upon-Tees aforesaid, for the purpose of exportation, such sum as the said proprietors shall appoint, not exceeding the sum of one halfpenny per ton per mile.”

The 21st section of the 4 Geo. 4, c. 33, after reciting the previous Act, proceeds thus: “ And whereas, by the said recited Act, the said proprietors were authorized and empowered from time to time, and at all times thereafter, to ask, demand, sue for, recover, and receive for the tonnage of all articles, matters, and things for which a tonnage duty is therein directed to be paid, which should pass the inclined planes upon the said railways or tram-roads, such sum as the said proprietors should appoint, not exceeding the sum of 1s. per ton: and whereas at the time of the passing of the said recited Act, it was understood and considered that one inclined plane only would be necessary upon the said railways or tram-roads thereby authorized to be made; but inasmuch as by reason of the deviations and alterations hereby authorized to be made, and by which it appears the length of the said railways or tram-roads will be shortened three miles or thereabouts, a greater number of inclined planes will be requisite; be it therefore enacted, that it shall and may be lawful to and for the said proprietors, from time to time, and at all times hereafter, to ask, demand, take, recover, and receive, to and for the use and benefit of the said proprietors, for all articles, matters, and things which shall pass one or more of the inclined plane or inclined planes upon the said railways or tram-roads, such sum as the said proprietors shall appoint, not exceeding the like rate, a sum of 1s. per ton, for and in respect of each of the said inclined planes, over and above and in addition to the rates, tolls, and duties by the said recited Act and this Act imposed or authorized to be taken and received for goods, wares, merchandise, and other things which shall be carried or conveyed upon the said railways or tram-roads, or any part thereof.”

ton inclined plane, which is on the main line of the Stockton and Darlington Railway. After the making of the railway, and branch, and inclined plane, another railway, called the Clarence Railway, which has also several branches, was made pursuant to subsequent Acts (not necessary to be referred to); which Clarence Railway joined the Stockton and Darlington Railway, below the Brusselton inclined plane, at Simpasture, about seventeen miles from the town of Stockton, ran along the Stockton and Darlington Railway, and extended thence for a distance of about sixteen miles, to Haverton Hill, and thence by a branch to Samphire Beacon, and thence branched off to Port Clarence upon the river Tees, within the port of Stockton-upon-Tees. Port Clarence and Middlesborough are on opposite sides of the river Tees, and at the distance of one mile from each other. The port of Stockton-upon-Tees, in its extended sense, comprehends not only Port Clarence, which is about four * miles down * 594 the river Tees, from the town of Stockton, but also the towns and ports of Hartlepool, which is twelve miles, and of Seaham, which is eighteen miles from the same town.

Before the passing of the first-mentioned Act, there was no railway from which coals could be shipped at the port of Stockton-upon-Tees, or along which coals could be carried for exportation there; nor, until the construction of the Stockton and Darlington Railway, were coals shipped for sale in that port.

The defendants had no property in, or control over, the Clarence Railway; Port Clarence, and all the staiths, buildings, and places for the shipment of coals there, and all the lands immediately surrounding the same, were the sole property of the company called the Clarence Railway Company. The two railways meet at a place called the Simpasture Station.

After the making of the said several railways and branches, the plaintiff sent, for the purpose of the same being shipped at Port Clarence, several parcels of coal from the Gordon Colliery, situate eight miles from Simpasture, and several other parcels of coal from the Norwood Colliery, situate nine

miles from Simpasture, along the Stockton and Darlington Railway, unto and over the said Brusselton inclined plane, and thence along the same railway to Simpasture, where they quitted the Stockton Railway and were carried along the Clarence Railway to Port Clarence; all which coals were afterwards shipped at Port Clarence for London, to be consumed there.

The defendants demanded and received from the plaintiff (under protest), in respect of the transit of the coals along their railway to Simpasture, tollage after the rate of 1½d. per ton per mile, being an alleged excess over one half-

* 595 penny per ton per mile, *amounting in the whole to the sum of 705l. 8s. 4d.; and also the additional sum of 6d. per ton upon the same coals in respect of their transit over Brusselton inclined plane, amounting in the whole to 404l.

The plaintiff also, on several other occasions, sent, for the purpose of the same being shipped at Middlesborough, several other parcels of coal from the Norwood Colliery, along the Stockton and Darlington Railway, unto and over the said Brusselton inclined plane, and thence along the last-mentioned railway to Middlesborough, where the same coals were afterwards shipped for London, to be consumed there. And the defendants demanded and received from the plaintiff, in respect of the transit of such coals along their railway, tollage after the rate of one halfpenny per ton per mile; and also (under protest) the additional sum of 6d. per ton upon the same coals, in respect of their transit over the Brusselton inclined plane, amounting to 20l.

The plaintiff brought this action to recover back these several sums of 705l. 8s. 4d., and 404l., and 20l., on the ground that the defendants were not entitled to receive tollage after a higher rate than one halfpenny per ton per mile in respect of the transit of the coals along their railway, nor any additional tonnage in respect of the transit of such coals over the Brusselton inclined plane; inasmuch as the same coals were intended to be shipped for the purpose of exportation, at places within the port of Stockton-upon-Tees.

The special verdict was argued before the Court of Com-

mon Pleas, which adjudged (a) that the defendants were entitled to demand an additional tonnage in respect of the transit of the coals over * the inclined plane, but * 596 were not entitled to demand of the plaintiff tollage, after a higher rate than one halfpenny per ton per mile in respect of the transit of the coals along their railway; and that the plaintiff was entitled to recover back from them the sum of 705*l.* 8*s.* 4*d.*, but not the sums of 404*l.* and 20*l.*, or either of them. A writ of error was brought in the Court of Exchequer Chamber, which affirmed (b) the judgment of the Court of Common Pleas. The present writ of error was then brought.

Mr. Kelly and *Mr. Smythe*, for the plaintiffs in error (defendants below). — The first question in this case is as to the construction of the words “shipped for exportation.” These words must apply to coals intended to be sent to foreign ports. That is the ordinary understanding of the words; and here the Act must be construed upon that ordinary understanding. Such is the rule of construction stated by Mr. Baron PARKE, in *Bennett v. Daniell*; (c) and by the same learned Judge, in *The King v. Pease*. (d) The rule thus stated is founded on the authorities collected in Bacon’s Abridgment. (e) If the words are so construed, it is plain that the toll receivable on these coals for passing along the railway cannot be restricted to that of one halfpenny per ton.

But besides this, it is contended, secondly, that the tonnage duty on coal about to be exported is not a tonnage duty imposed in substitution for, but is in addition to, that which is payable for coal passing along the railway and not intended for exportation. * The amount of the two * 597 duties is a strong circumstance in favour of this argument. The proprietors have the liberty of imposing any toll

(a) 2 Man. & Gr. 134.

(b) 3 Man. & Gr. 958.

(c) 10 B. & C. 500; 5 Man. & Ryl. 441.

(d) 1 Nev. & Man. 690. See the rule as to the construction of statutes in the opinion delivered by Lord Chief Justice TINDAL, on behalf of the Judges, in the *Sussex Peerage Case*, ante, p. 85.

(e) Tit. Statute, 1, 5.

not exceeding the amount of 4*d.* per ton per mile on coal carried along the railway; and it never could have been intended that on coals intended to be shipped for exportation, the tonnage duty, which might otherwise have been 4*d.*, should be at once reduced to one halfpenny. There is nothing in the Acts to show that the Legislature desired to encourage to such an extent the exportation of coals. There are not in the Acts any provisions to compel the coal-owners to declare whether the coals are or are not intended for exportation; nor any means afforded to the proprietors of the railroad to compel the payment of the larger tonnage duty, should such a declaration be fraudulently made, or should it, after having been fairly made, be abandoned. These circumstances are sufficient to show that the halfpenny per ton is an additional toll to be taken by the proprietors at the coast terminus of their railway.

But assuming the Court below to have given a correct judgment on these points, still it is clear that the lower rates of duty cannot be claimed where the coals are taken along a part of the Stockton line, and then conveyed along the Clarence line to the place of shipment. The low rate of charge might have been consented to by the proprietors of the Stockton Railway, because of the right to carry the whole distance; but they might have refused to accept that low rate of charge, subject to the right of the proprietors of another railway to divide the traffic with them, by enabling the public only to use a part of their line. And this argument of probability is strengthened by the fact, that at the time these

tolls were fixed by the Act of 2 Geo. 4, there was no other railway in existence * to interfere with the traffic on the plaintiffs' line. And if the toll upon coals to be exported applies to all coal shipped from the port of Stockton, the expectation of having a very large traffic in that way, in which they might be interested in the shipping at their terminus, as well as in carrying along their line, might have been the inducement for the Stockton railway proprietors to consent to carry coals for exportation at such a low rate of tonnage. But that consent never would have been given had they imagined that the amount of their business, both as to

carriage and shipment, was to be divided in this manner with another railway. The Act must be construed as a Parliamentary contract made with the company. How is it possible for the railway proprietors to know that the coals taken off their line at Simpasture are actually intended for exportation? The difficulties of ascertaining that fact apply with double force at this part of the argument, and show the inconsistency of the grounds upon which the liability to the lower rate of tolls is insisted upon.

Besides this, it is contended that the port of Clarence is not, within the words of the Act, "the port of Stockton." (a) The preamble of the Act shows that by these words was intended that part of the river which is on the Stockton side of the Tees, "at or near Stockton," and the "town and port of Stockton;" and does not include what for other purposes may be considered the port of Stockton; namely, something which includes towns many miles distant from Stockton. If the enacting part of the Act is doubtful, the preamble must be taken to explain * and construe it. Coke * 599 upon Littleton, (b) *Crespigny v. Wittenoom*, (c) *Mason v. Armitage*, (d) and *Malton v. Cove*. (e) The application of the preamble, as the means of construing this enactment, is the more imperatively required here, as the section which gives the proprietors the right to levy the toll upon the exportation of coals, speaks of them as "shipped on board any vessel in the port of Stockton-upon-Tees aforesaid." This last word compels a reference to the preamble; and by so doing shows that the port here spoken of is that which has been before described, and which is the port of the town of Stockton, the port "at or near Stockton." The case of *The Hull Dock Company v. Browne* (g) is in favour of this construction.

As to the toll demanded in respect of passing the inclined plane at Brusselton, it is manifest that as the formation of

(a) As to the meaning of the word "port," see 2 Man. & Gr. 155, where the editors have introduced a very learned note on this subject.

(b) 79 a.

(c) 4 T. R. 790.

(d) 13 Ves. 25.

(e) 1 B. & Ad. 538.

(g) 2 B. & Ad. 43.

that inclined plane was the subject of a special expense to the proprietors, the legislature gave them the right to make a special charge in respect of the use of it; and whatever the general tolls may be, that that charge is to be made in addition to them.

Lord BROUGHAM intimated that the Lords had agreed that the word "exportation" must be construed in its largest sense, and that the counsel for Mr. Barrett need not trouble themselves on that point.

Sir Thomas Wilde (with whom were *Mr. Faber* and *Mr. Fitzherbert*), for the defendant in error. — The judgment of the Court below was right in declaring that the toll of one halfpenny per ton per mile was not cumulative. The * 600 toll is in the nature of a tax, and * the Act which confers the right to take it must be construed strictly against the parties in whose favour that right is created. No charge can be fixed on the public, except by the clear words of a statute; and this rule holds, notwithstanding what has been said on the subject of viewing this Act as a Parliamentary contract with the proprietors of the railway. *Gildart v. Gladstone*, (a) *Hull Dock Company v. Browne*, (b) *Liverpool Canal Company v. Hustler*, (c) *Brittain v. The Cromford Canal Company*. (d) This Act was obtained by the proprietors of the railway, and must for that reason also be construed against them, and not in their favour. *Scales v. Pickering* (e) and *Niblett v. Poltow*. (g) The case of *The Hull Dock Company v. Browne* applies to both these considerations, and shows the principle of construction applicable to Acts of this sort to be, that particular words are to receive the narrower or the more extended meaning, according as such meaning will operate most beneficially for the public.

This line of argument applies to and negatives the claim of an additional toll in respect of the coals passing the inclined plane at Brusselton.

(a) 11 East, 675.

(b) 2 B. & Ad. 43.

(c) 1 B. & C. 424; 2 Dowl. & Ryl. 556.

(d) 3 B. & Ald. 141.

(e) 4 Bing. 448; 1 Moore & P. 195.

(g) 1 New Cas. 81; 4 Moore & S. 595.

The only remaining question then is, whether Port Clarence is within the port of Stockton-upon-Tees. There can be no doubt that it is ; there is no such ambiguity in the section imposing the tolls on coals exported, as to require any reference to the preamble for the purpose of explaining it. The whole port of Stockton is intended, and not that which is on the side of the town and adjoins it. In the enacting section * the town is never spoken of ; the * 601 expression is, “the port of Stockton ;” and that expression must receive its widest construction, according to the principles and the authorities already cited.

September 4.

THE LORD CHANCELLOR. — My Lords, various points were argued at the bar in this case, as well in the Court below as before your Lordships. The first question relates to the meaning of the terms “shipped for exportation,” in the Stockton and Darlington Railway Act ; whether they were confined to exportation to foreign countries, or included shipments of coals to be carried coastwise to other parts of the kingdom. There is not, I think, any reason for adopting the narrower interpretation. The terms are large enough to comprehend both ; and if it was a case of doubt, the rule is, in Acts of this nature, to adopt the construction most beneficial to the public. I may further observe, that from the nature of the article, the home market would probably have been at least as much in the contemplation of the legislature as the foreign.

Another question is, whether the duty upon coal shipped for exportation is in addition to the duty payable for all coal carried along the railway,—whether it is cumulative ? I think it is not, but, on the contrary, that coal so destined was meant to be excepted from the general rate, and subjected to a lower amount of duty. If it was intended that both duties should be payable, words should have been added, as is usual in such cases, to denote that intention. The argument is, that as all coals are liable to a toll not exceeding 4*d.* a ton per mile, and as a duty is imposed on coals shipped for exportation, to satisfy these terms the latter duty must be cumula-

tive. But it is sufficient for the purpose of meeting
* 602 this * reasoning to observe that the duty upon all coal shipped for exportation shall not exceed one half-penny; which is inconsistent with the supposition of its being in addition to the former rate. In a case of doubt, the same rule would apply here as upon the former question.

The third question relates to the place of shipment. The reduced toll is payable for all coal conveyed along the railway and shipped on board any vessel or vessels in the port of Stockton-upon-Tees, for the purpose of exportation. Several quantities of coal were conveyed along the Stockton Railway, to its junction with the Clarence Railway, and thence along the latter railway to Port Clarence, where the coal was shipped for London. Port Clarence is within the limits of the port of Stockton-upon-Tees. It is contended by the defendants that they are not, under these circumstances, limited to the right of demanding the reduced duty; that such reduced duty is confined to cases where the coal is carried along the line to its terminus at or near Stockton; that the port of Stockton-upon-Tees, means the town and port of Stockton, and not the port of Stockton in its more extended sense, which includes Hartlepool, Seaham, and other places several miles distant from Stockton; that the words of the Act are, the port of Stockton-on-Tees aforesaid, and have reference to the preamble, in which the port is always mentioned in connection with the town, "the town and port of Stockton-on-Tees."

But the words of the clause by which the duty is imposed, make no mention of the town. The duty is upon coals "shipped on board of any vessel in the port of Stockton-on-Tees aforesaid;" and I think, therefore, the word of reference, "aforesaid," has not the effect contended for by the defendants. There is nothing in the Act that requires
* 603 the coal to be carried * along the whole line. The duty is payable by the mile; and the parties may, I think, leave the railway at any convenient point, paying only the reduced duty, provided the coals are shipped within the port for exportation. The case comes within the words of the Act, and there seems to be no reason for adopting a more

restricted interpretation for the benefit of the Company by whom the Act was obtained.

The remaining question relates to the duty for passing the inclined plane; viz., whether it is payable in respect of coals exported. It is payable for "all the articles, matters, and things for which a tonnage is therein before directed to be paid." This, I think, is a cumulative duty, and is payable without reference to distance. But "all coals" are before mentioned: it would, therefore, apply to them. It is true, that a lesser duty is afterwards assigned to coals shipped for exportation; but this I consider is merely a reduction under special circumstances, of the former duty, and does not prevent the charge for the inclined plane attaching. I think, therefore, that the judgment of the Court below must be affirmed.

LORD BROUGHAM. — My Lords, I am of the same opinion as that which has been expressed by my noble and learned friend. This was a writ of error from the Exchequer Chamber, affirming a judgment given by the Court of Common Pleas in favour of the plaintiff there (the defendant in error here), upon an action of *assumpsit* by him in the latter Court against the defendants (the plaintiffs in error), to recover back three sums of 705*l.* 8*s.* 4*d.*, 404*l.*, and 20*l.*, exacted by and paid to them in respect of a toll of more than $\frac{1}{2}$ *d.* per ton per mile upon coal carried along the railway, and for the transit of coal * over a certain inclined plane * 604 called Brusselton plane, such coals being shipped for exportation at places within the port of Stockton-upon-Tees. A special verdict had been found at the trial; and upon the facts found thereby, the Court of Common Pleas gave judgment that the company was entitled to take the additional tonnage in respect of the transit of coals along the Brussleton inclined plane, but was not entitled to exact more than $\frac{1}{2}$ *d.* per ton per mile for the carriage of the coal along the railway; and that, therefore, the defendant in error (the plaintiff below) was entitled to recover back the first-mentioned sum of 705*l.* 8*s.* 4*d.*, but not either of the last-mentioned sums of 400*l.* or 20*l.* This judgment of the Court of Common

Pleas being affirmed in the Court of Exchequer Chamber, the present writ of error was brought, which now remains for judgment. Of the five questions which have arisen in the course of these proceedings, two are now given up, and one seemed so clear to your Lordships, that the learned counsel for the defendant in error was stopped from going into it: that was with respect to the point of embarkation. The questions abandoned are, the claim made by the company to charge $\frac{1}{2}d.$ per ton under the 5th article of the 62d section of the Act, cumulating with the $4d.$ under the 2d article; and the denial of the right of the company to charge $1s.$ a ton for passing over the inclined plane where $\frac{1}{2}d.$ per ton is charged, and not merely to take that $\frac{1}{2}d.$ The latter of these points had been given by the judgment below against the plaintiff, now defendant in error, and he no longer resists the judgments in this particular. The first had been found for him,

and the plaintiffs in error now abandon their objection to it. The third question arose * upon an argument used by the plaintiffs in error, that the coals, having been found by the special verdict to have been shipped by the plaintiff below for carriage to London, and therefore for home consumption, this does not come within the meaning of the word "exportation" in the clause or article which restricts the company to the charge of $\frac{1}{2}d.$ on coals shipped for exportation on board of vessels in the port of Stockton; but it seemed clear that no such construction could be put upon the word as would exclude a shipment in that port to be carried coastwise to London, which the special verdict found to be the case here.

The remaining two questions, then, alone stand for decision, and to those my noble and learned friend has applied himself, and I come to the same conclusion with him upon them; and these are, first (and it is a very material one), does "Stockton-upon-Tees" mean the town or the port of Stockton, the shipments in question being made, as appears by the special verdict, at Port Clarence, upon the river Tees, which Port Clarence is found also to be within the port of Stockton, but not within the town of Stockton; and, secondly, has the company any right to charge any greater sum

per ton than the $\frac{1}{2}d.$? This second question really resolves itself into the first, or, at any rate, is immaterial if the first be plainly against the company.

The main question, then, relates to the meaning of the words in the Act, "port of Stockton-on-Tees aforesaid." When I say the Act, I mean the 5th article of section 62 of the Act, which 5th article is an excepting article; and it is very material to keep in view, with reference to the question in this case, that it is an article excepting coal from high duty. * The only previous mention of the port * 606 is in the preamble, which, in mentioning the *termini* of the proposed railway, describes one of them as "the river Tees, at or near Stockton." Now in this place, doubtless, the town is intended, and it is intended because the river Tees is mentioned, on which it stands, and it would be insensible to give it any other construction. But observe, no mention is here made of port at all. It is only the town, that is, Stockton alone is mentioned. Afterwards mention is made of "the town of Stockton-upon-Tees;" of course here there can be no doubt. Hitherto nothing is said of the port. But then we have mention made of it; and how? It is said that the projected railway will be useful, "by facilitating the conveyance of coal, iron, lime, corn, and other commodities, from the interior of the county of Durham to the town of Darlington and to the town and port of Stockton;" and "also the conveyance of merchandise and other commodities from the said town and port of Stockton to the town of Darlington, and into the interior of the county of Durham." Here is a totally different phraseology, and it is used respecting a different subject-matter, namely, the commerce of the place; and accordingly we find the "port," as well as the town, mentioned in this place, whereas the town only was mentioned when the question related to the *terminus* of the railway.

This may reasonably, therefore, be intended to mean whatever goes by the name of the port of Stockton; and the port of Stockton, by the verdict, is found to include Port Clarence, which appears to be five miles from the town; and even Hartlepool is included, which is twelve, and Seaham is

included, which is twenty-two miles distant from the town.

It seems quite impossible, therefore, to limit the words
 * 607 in the * 5th article of the section, "port of Stockton-on-Tees aforesaid," by the first two instances where the town is mentioned in the preamble; there not being any thing said in those two places of the port, which is only mentioned when there is a statement of traffic to and through the port, which may very well mean the whole port; and so the words in the preamble, at the utmost, leave whatever doubt arises on the acting clause unsolved.

It must be observed that, *in dubio*, you are always to lean against the construction which imposes a burden on the subject. The meaning of the legislature to tax him must be clear. It was so held in *The Hull Dock Company v. Browne*, (a) which both parties in this case relied on, though for different purposes, and which the plaintiffs in error especially cited in support of the argument for them. The like law was laid down by the Court of King's Bench in the case of a company claiming against the public. *Gildart v. Gladstone* (b) and other cases entirely concur in the same reasonable view. The Court there said, in effect, "here is a company which gets an Act of Parliament to tax the subject; it is incumbent upon that company to do two things,—to take care that the Act of Parliament is made clear and undoubtful, especially upon those clauses by which the company seeks to impose a burden upon the public; and if companies do not choose to take the trouble to do that, let them abide by the consequences; they will not be able to levy the duty." But here, the question is of an exemption or restriction of the duty imposed. The article in question restricts the duty on exported coal to a halfpenny, being 3½d.

less than the second article allows, making it one-
 * 608 eighth * part only of the tax. Therefore we are, according to the books cited, to lean in favour of the construction, where it is doubtful, which, by extending the limits of the port, enlarges the bounds of the exemption

(a) 2 B. & Ad. 48.

(b) 11 East, 675; 12 East, 489; 2 Taunt. 97.

from the special taxation. Now, as to the import of the case of the Hull Dock Company on the first question generally, it has really no bearing whatever upon the contention of the plaintiffs in error, except that it is a case where a port, that of Hull, was held not to comprise all the other ports which, for certain specific purposes, — revenue purposes, — are known and held to belong to it. The grounds on which this was held are clear and satisfactory, and not one of them is to be found in this case, even if there did not exist the general rule already referred to against applying doubtful clauses in favour of the company; which rule clearly does apply here, but applies to include, not to exclude, Port Clarence in Stocktonport. And that is the only part of the decision in the case of *The Hull Dock Company v. Browne* which has the least application to this case; for that the other part of the case has no application is quite clear. Then there were cited the returns to two commissions, one *in tempore* Elizabeth, the other *in tempore* Charles 2. By the former it is found that Scarborough, Grimsby, York, and other ports, are not within Hull, but are members of the port of Hull; York being forty miles off, or thereabouts. By the latter return to the commission in Charles the 2d's time, it is said by the Crown, "our members of Hull;" that is to say, Scarborough and others, Hull having been long since granted to the corporation by the Crown, certainly as early as Richard the 2d; possibly, according to the corporation's argument, as early as Edward the 1st. This plainly indicates that the word "our members," * applies to the creeks or outports, * 609 and not to Hull, because Hull was not "our members," or "our port." It appeared, too, that for all the Humber, all the Trent, and all the Ouse, comprising many places of trade and many ports, there is but one custom-house; viz., that at Hull. This explains why they are called members of Hull. Hence the usual treating of these ports as members of Hull for revenue purposes, and for none other.

Lastly, two other Acts of Parliament, the 42d Geo. the 3d, and the 45th Geo. the 3d, were referred to in that case, in which the words "port of Kingston-upon-Hull" were em-

ployed, when it was quite plain that the port of the town of Hull alone could be intended. The case, therefore, of the *Hull Dock Company v. Browne* is completely distinguishable from this, and its import is truly in favour of, and not in opposition to, the judgment of the Court below. I therefore concur in the motion of my noble and learned friend, that the judgment of this House must be given for the defendant in error, with costs.

Judgment affirmed, with costs.

1844.

HENRY TAYLOR, Esquire	<i>Plaintiff in Error.</i>
WILLIAM CLEMSON and JOSEPH VAUGHAN	<i>Defendants in Error.</i>

Statute. Railway Company. Inquisition. Jurisdiction.

An Act of Parliament authorized a railway company to take lands necessary for the railway works, on payment or tender of such sums of money as should have been agreed upon, or awarded by a jury in the manner directed by the Act : and by the section of the Act for settling differences between the company and owners and occupiers of, or persons interested in, lands to be taken, it was enacted that if any such person should not agree with the company as to the amount of purchase-money, or should refuse to accept such purchase-money as should be offered by the company, or should, for twenty-one days after notice to him in writing, neglect or refuse to treat, or should not agree with the company for the sale of his interest, &c., the company might issue a warrant to the sheriff to summon a jury to assess the sum to be paid for the purchase of the lands ; and the sheriff should give judgment for such sum.

The company issued a warrant, purporting to be pursuant to the powers given by the Act, and requiring the sheriff to summon a jury to assess the value of the plaintiff's land, &c. The jury was summoned, and assessed the value ; the owner of the land attending, and protesting that the company had no right to take his lands, as not being de-

scribed in the schedule to the Act. An inquisition was recorded, purporting to be taken "pursuant to the Act, on the oaths of jurors duly impanelled, in pursuance of the warrant to the inquisition annexed, who assessed the sum to be paid for the property particularized in the warrant, and authorized by the Act to be taken for the railway; whereupon the sheriff, in pursuance of the Act, gave judgment for that sum. Neither the warrant nor inquisition stated that the owner had refused to treat, or had not agreed with the company for the sale of his land, nor that the company had served on him the notice required by the Act to be given: but it appeared *aliunde* that he did not agree with the company, and that he had received the requisite notices. *Held*—

1. That sufficient facts were stated in the inquisition and warrant to show the jurisdiction of the sheriff and jury.
2. That the impanelling a jury, and an assessment by them, being facts inconsistent with an agreement, necessarily imply non-agreement; and no inquisition is defective for not stating a fact which is necessarily implied by those that are stated.
3. That notice was waived by the party's appearing, not protesting for want of notice.¹

May 2, 3, 31; September 4, 1844.

THIS was a writ of error upon a judgment of the Court of Exchequer Chamber, affirming a judgment * of the Court of Queen's Bench on a special verdict, * 611 which was found in an action of *assumpsit* at the Liverpool Summer Assizes, 1839. (a)

The action was brought by the plaintiff in error against the defendants in error, to recover the sum of 26*l.* 5*s.*, being one year's rent, for the alleged use and occupation by them of certain property of the plaintiff, situate at Manchester, and described in his particulars of demand as "a house, cottage, two cellars, and a school-house;" to which description was added afterwards, by amendment, "yard and garden." The defendants pleaded payment of 14*l.* into Court, and *non-assumpsit* as to the residue. The plaintiff replied, accepting the money paid into Court, and joining issue on the other plea. It was admitted at the trial, that the sum of 14*l.* was

(a) 2 Q. B. Rep. 978; 2 Gale & Dav. 346.

¹ See *Hinckley* Pet. 15 Pick. 447; *Walker v. Boston & Maine Railroad*, 3 Cush. 1; *Brown v. Lowell*, 8 Met. 172; *Parish v. Gilmanton*, 11 N. H. 293.

sufficient to cover the plaintiff's claim for rent up to the 24th of June, 1838; but he claimed rent to the 25th of December in that year. The defendants' answer to this claim was, that on the 18th of June, 1838, they had been evicted from the premises, of which they before had been the plaintiff's tenants, by the "Manchester and Leeds Railway Company," who had taken possession of them for the purpose of making the works authorized by their Acts of Parliament.

The substantial question in the case was, whether or not the tenancy of the defendants to the plaintiff was determined by their eviction from the property before described, by the said company, on the 18th of June, 1838; and that involved the inquiry whether the company had, in their proceedings to take possession of that property, duly complied with the requisites of the Act 6 & 7 Will. 4, cap. cxi. (local and
 * 612 * personal), entitled "An Act for making a Railway from Manchester to Leeds." The defendants on the record were indemnified by the company, who were the real defendants as well in the Court below as in this House.

The parts of the Act material to be stated are as follows :—

Sect. 3 makes it lawful for the company to make and maintain a railway, in the line, &c., or over the lands, delineated on the plans and described in the books of reference deposited respectively with certain clerks of the peace : and sect. 4 recites that "maps or plans and sections, describing the line of the said railway, and the lands in, &c., and upon which the same is intended to be carried, together with books of reference thereto, containing lists of the names of the owners and occupiers or reputed owners and occupiers of such lands, have been deposited" with such clerks of the peace.

"PROVIDED always," by sect. 5, "That it shall be lawful for the said company to make the said railway and other works upon or through the lands delineated on the said maps or plans, although such lands or any of them, or the situation thereof respectively, or the name of the owners or of the occupiers thereof respectively, may happen to be omitted, misstated, or erroneously described in this Act, or in the schedule thereto, or in the said books of reference, if it shall appear to any two or more justices of the peace for the said county palatine of Lancaster, or for the west riding of the county of York, or for the borough of Leeds (in case of a dispute about the same), and be certified by writing under their hands, that such omission, misstatement, or erroneous description, proceeded from mistake."

“ PROVIDED also,” by sect. 7, “ That nothing herein contained shall authorize the said company to take, injure, or damage, for the purposes of this Act, any house or other building which was erected before the 30th of November, 1835, or any ground which was then set apart and used as and for a garden, orchard, yard, &c., other than and except such as are specified in the schedule to this Act annexed, without the consent in writing of the owner and occupier thereof respectively, unless the omission thereof in such schedule shall have proceeded from mistake, and unless it shall be so certified in manner herein before provided for in cases of unintentional errors in the said book of reference.”

* And by sect. 59 it is enacted, “ That the railway, in cross- * 613
ing the lands of the Bishop of Bristol and Joseph Livesey, shall pass between certain newly laid-out streets there, called Allen Street and Charles Street, and so as to leave a space of twenty-four yards at the least between the railway and one of the said streets ; or in case there shall not be a space of twenty-four yards between the said railway and either or both of the said streets, the said company shall, if required, purchase such space or spaces as shall be less than twenty-four yards, and also one-half of Allen Street or Charles Street, or both.”

Sect. 138, so far as it is material to the points in dispute, is as follows :
“ And for settling all differences which may arise between the said company and the several owners and occupiers of, or persons interested in, any lands which shall or may be taken, &c., or injuriously affected by the execution of any of the powers hereby granted ; be it further enacted, that if any person, corporation, or trustee so interested or entitled, and capacitated to sell, agree, convey, or release as aforesaid, or any other person, shall not agree with the said company as to the amount of such purchase-money or satisfaction, recompense, or other compensation as aforesaid, or if any of the parties entitled to receive such purchase-money, &c., shall refuse to accept such purchase-money, &c., as shall be offered by the said company, and shall give notice thereof in writing to the said company within one calendar month next after such offer shall have been made, and the party giving such notice shall therein request that the matter in dispute may be submitted to the determination of a jury ; or if any such parties as aforesaid shall for the space of twenty-one days next after notice in writing shall have been given to the clerk, agent, or principal officer of any such corporation, or to any of such trustees or persons respectively, or left at his last or usual place of abode, or with the tenant or occupier of any lands required for the purposes of this Act, neglect or refuse to treat, or shall not agree with the said company, for the sale, conveyance, and release of their respective estates or interests, &c., or for the satisfaction, &c., to be paid to them for any damage, &c., or shall by reason of absence be prevented from treating, or shall by reason of any impediment, &c., be incapable of making such agreement, conveyance, or release as shall be necessary or expedient for enabling the said company to take such lands, &c., or shall not disclose and prove the state of the title to the

premises of which they respectively may be in possession, or of the share, interest, or charge which they may claim to be entitled unto or interested in, in case they shall be required so to do by the said company, or
 * 614 in any other case * where agreement for compensation for damages incurred in the execution of this Act, or for the purchase of lands required for the purposes of this Act, cannot be made, then and in every such case the said company shall and they are hereby required from time to time to issue a warrant, either under their common seal or under the hands and seals of three at least of the directors, to the sheriff of the county in which the lands in question shall be situate."

Then, after certain provisions as to jurymen and witnesses, the section proceeds: —

" And such jury shall, upon their oaths, &c., inquire of and assess, and give a verdict for the sum of money to be paid for the purchase of such lands (except, &c.), and also the sum of money to be paid by way of satisfaction, &c., either for the damages which shall before that time have been done or sustained, or on any other account, &c., which satisfaction, &c., shall be inquired into and assessed separately and distinctly from the value of the lands so to be taken or used as aforesaid; and the said sheriff, under-sheriff, &c., shall accordingly give judgment for such purchase-money, satisfaction, &c., as shall be assessed by such jury; which said verdict, and the judgment thereon to be pronounced as aforesaid, shall be binding and conclusive to all intents and purposes upon all persons and corporations whatsoever: provided also, that not less than seven days' notice in writing of the time and place at which such jury are so required to be returned, shall be given by the said company to the party with whom any such controversy shall arise, either by delivering such notice to such party, or by leaving the same at his place of abode," &c.

By sect. 140 it is enacted, " That the said verdicts and judgments, being first signed by the said sheriff, &c., shall be kept by the clerk of the peace for the county or riding in which the matter in dispute shall have arisen, among the records of the quarter sessions of such county or riding, and shall be deemed records to all intents and purposes," &c.

By sect. 153 it is enacted, " That in case any party to whom any money shall be agreed or awarded to be paid for the purchase of any lands to be taken or used under or by virtue of the powers of this Act, or for any interest or for compensation as aforesaid, shall refuse or neglect to accept the same, or to convey the premises or interest in the premises purchased, &c., in every such case it shall be lawful for the said company to order the money so agreed or awarded as aforesaid to be paid into the bank of

England in the name of the Accountant General of the Court of

* 615 Exchequer, to be placed to his account to the * credit of the parties interested in the said lands, &c., subject to the control and dispo-

sition of the said Court ; which, on the application of any party making claim to such money or to any part thereof by petition, is hereby empowered, in a summary way, &c., to order the same to be laid out and invested in the public funds, and to order distribution thereof or payment of the dividends thereof according to the estate, title, or interest of the party making claim thereunto," &c.

By sect. 160 it is enacted, " That upon payment or legal tender of such sums of money as shall have been agreed upon between the parties or awarded by a jury in manner aforesaid, for the purchase of any lands, &c., within three months after the same shall have been so agreed upon or awarded, or if the parties so respectively interested and entitled as aforesaid cannot be found, or shall be absent from England, or shall refuse to receive such money as aforesaid, or shall refuse, neglect, or be unable to make a good title to such lands to the satisfaction of the said company, &c., then and in any such cases, upon payment of such money into the Bank of England, as herein before directed, to the credit of the parties interested in such lands, &c., it shall be lawful for the said company immediately to enter upon such lands, and thereupon such lands and the fee-simple and inheritance thereof, &c., and all the estate, use, trust, and interest of all parties therein, shall thenceforth be vested in, and become the sole property of the said company, to and for the purposes of this Act." &c. (a)

The special verdict stated (among various matters not necessary to be here repeated): that before and at the time of the passing of the said Act, the defendants were tenants to the plaintiff of the premises mentioned in the declaration, at the yearly rent of 26*l.* 5*s.*, payable quarterly; and part of which were in the occupation of other persons, as under-tenants to the defendants: that the said railway company, incorporated by the said Act, entered upon and took possession of the same premises on the 18th of June, 1838, and therefrom ejected the defendants and their respective under-tenants: * that the tenancy would have con- * 616 tinued, and the plaintiff would have been entitled to such rent, until the 25th of December, 1838, unless such tenancy was determined by such eviction and proceedings of the company: that the sum (14*l.*) paid into Court covered all claim of rent to the quarter-day after the eviction; and therefore the jury found the issue for the plaintiff as to the residue of his claim, *unless* the defendants ceased to be ten-

(a) The above sections of the Act, with others which are not material here, are more fully set out in the reports before referred to.

ants to the plaintiff by reason of such eviction and proceedings; but if by reason of those proceedings they ceased to be tenants, the jury found the issue for the defendants. The verdict then stated the passing of the said Act of Parliament in 1836, and that previously thereto maps or plans and sections describing the line of railway and the lands through which it was intended to be made, together with books of reference containing the names of the owners and occupiers of such lands, were deposited with certain clerks of the peace: that all the messuages, lands, and tenements mentioned in the notices (a) of the company, and in their warrant and inquisition afterwards set forth, comprehending (among many other things) the premises in the declaration mentioned, were described in the said maps or plans and books of reference.

The verdict (after stating that the whole capital of 1,300,000*l.* had been subscribed, &c.) further stated that the company, having occasion to take, for the purpose of making the railway and works authorized by the Act, certain messuages, lands, and tenements, including (among others) the premises in the plaintiff's declaration mentioned, on the

28th of October, 1837, caused notices to be served * 617 on the plaintiff and defendants, * and others therein named, being the parties interested in the property therein mentioned; which notices (set out in the verdict) required such parties to furnish a statement of their estate and interest in the property, and to treat and agree with the company for the sale thereof, and for compensation for damage; and that in case of non-compliance with the requisitions of such notices, the company would issue a warrant to the sheriff of Lancashire (in which county the property was situate) to summon a jury, to make such assessment as by the said Act, and another Act for amending the same, was authorized: that the plaintiff did not disclose his title to the property required, nor agree with the company for the sale thereof, or compensation for damage: that the company, on the 17th of January, 1838, issued their warrant to the said

(a) See them in 2 Q. B. 987 *et seq.*; 2 G. & D. 346.

sheriff, requiring him to summon a jury to make such assessment accordingly : (a) that notices were given to all the parties of the time and place of * holding the * 618 intended inquisition, with a plan annexed to each, corresponding with the plan drawn on the warrant (a form

(a) The warrant, which was fully set out in the verdict, was in substance as follows : " To the sheriff of the county palatine of Lancaster : We, the Manchester and Leeds Railway Company, incorporated by an Act, &c., do, by this our warrant, pursuant to the powers for that purpose given to us by the said Act, require you the said sheriff to summon, &c., a jury of at least eighteen sufficient and indifferent men, qualified according to the laws of this realm to be returned for trials of issues in her Majesty's Courts of Record at Westminster, to be and appear before you, &c., at, &c., on Friday, the 2d of, &c., in order that you the said sheriff may, out of the persons so summoned, &c., swear or cause to be sworn twelve, who shall be a jury for the purpose of inquiring of, assessing, and giving a verdict for the sum of money to be paid to Henry Taylor, Ebenezer Thomson, William Clemson, Joseph Vaughan, &c. (naming eleven others), or other person or persons interested, for the purchase of, 1stly, all that piece or parcel of land, with the buildings thereon, delineated on the map drawn in the margin hereof, &c., containing 31,157 superficial square yards, &c. (then followed particular descriptions of that and other pieces of land, comprising the premises in question); and which pieces of land, and the buildings thereon as delineated in the said plan, &c., are about to be purchased and taken under the authority of the said Act, and used for the purposes of the said railway. And also the sum of money, if any, to be paid to the said H. Taylor, E. Thomson, W. Clemson, J. Vaughan (and others named), or other the person or persons entitled thereto, by way of satisfaction or compensation to the owners or reputed owners and occupiers of the said pieces or parcels of land, cottages, buildings, hereditaments, and premises, or other the persons interested therein respectively, either for the damage, if any, which before the said 2d of February next, shall have been done to or sustained by the owners or reputed owners or occupiers of the pieces or parcels of land, cottages, &c., and premises herein before mentioned, or other persons interested therein respectively, by reason of the execution of any of the works by the said Act authorized, &c., or for the future temporary or perpetual, or for any recurring damage, if any, which shall or may be done, &c., and the cause or occasion of which shall have been in part only obviated or repaired by the said company, and which cannot or will not be further obviated or repaired by them ; such satisfaction or compensation to be inquired into and assessed separately from the value of the said lands, cottages, &c., and premises so to be taken as aforesaid."

of the notice was set out in the verdict; it followed the form of the warrant).

The verdict then found that the sheriff, in compliance with the warrant, summoned a jury: that the plaintiff caused a protest to be served on the law clerk of the company and on the under-sheriff, not objecting to the form or sufficiency of the said warrant, or of any of the said notices, but merely denying the right of the company to take certain specified portions of the property required by them, as not being sufficiently described in the books of reference or schedule annexed to the said Act: that the omission in such schedule was sufficiently corrected by the justices' certificate (afterwards mentioned): that the inquest jury attended at the time and place mentioned in the said warrant and notices; and the plaintiff,

* 619 under such protest as aforesaid, attended * by counsel, making no other objections to the proceedings than those before mentioned: that no evidence was given of his title, or that of the other parties named in the proceedings, to the property in question: that he examined witnesses to enhance the value of the property, but did not require his interest therein to be assessed separately, from that of the other parties named in the notices: and that the interests of those parties were not required to be assessed separately: that an inquisition, verdict, and judgment were taken and drawn up in writing, signed by the sheriff, &c., and deposited with and kept by the clerk of the peace among the records of the sessions.

The special verdict then, after setting forth the inquisition, verdict, and judgment of the sheriff thereon, (a) and after

(a) They were as follows: "Lancaster to wit: An inquisition, verdict, and judgment had, taken, &c., on Friday, 2d of February, 1838, before me, T. B. C., Esq., sheriff of, &c., pursuant to an Act (stating said Act), on the oaths of (jurors' names), sufficient and indifferent men, qualified according to the laws of this realm to be returned for trials of issues in her Majesty's Courts of Record at Westminster, here duly impanelled, summoned, and returned by the said sheriff of the said county palatine, in pursuance of, and in obedience to, a warrant made and issued under the common seal of the Manchester and Leeds Railway Company, to me directed and delivered, and hereunto annexed; who being sworn and charged as in and by the said warrant directed, upon their oaths

finding the identity of the property * mentioned in * 620 the respective notices, warrant, and inquisition, including the property mentioned in the declaration, and after stating a requisition by the law-clerk of the company to the plaintiff, to furnish to them an abstract of his title to the property, and his refusal to accept the purchase-money awarded, or show his title to the property, stated, that after such refusal, a check was drawn by two of the directors of the company on their bankers, requiring them to pay plaintiff

present and say, that they have inquired of, found and assessed, and do find, assess, and give this their verdict for the sum of 17,000*l.*, to be paid by the said Manchester and Leeds Railway Company, for the purchase of, firstly, all that piece or parcel of land, with the buildings thereon, delineated in the plan drawn in the margin of the said warrant, and therein coloured blue, containing in the whole 31,157 superficial square yards or thereabouts, and forming part of the parcel of vacant land, and also forming part of the site of the two cottages and yards thereto belonging, and also of the outbuildings and yards belonging to two other cottages herein after mentioned, that is to say (describing them); and which vacant land, cottages, and yards and outbuildings are shown on the map or plan of the said railway, deposited at the office of the clerk of the peace for the said county, on the 13th of November, 1835 : and also all that piece of land lying on the north-east of St. George's Street aforesaid, with the cottages, school, and other buildings thereon, which in the said plan drawn in the margin of the said warrant is coloured green, and containing 7788 superficial square yards or thereabouts, being part of a certain piece of vacant land and buildings thereon erected, which in the said map or plan and book of reference deposited with the clerk of the peace aforesaid, is (with certain other property) numbered twenty-five : all and singular which said premises are in the said warrant particularized, and are by the said Act of Parliament authorized to be taken by the said Manchester and Leeds Railway Company, for the purposes in the said Act mentioned. And the jurors, &c., do further present and say, that they have inquired of and do find that there is no sum of money to be paid by the Manchester and Leeds Railway Company by way of compensation and satisfaction for any damage, injury, and loss by them directed to be inquired of, as in the said warrant mentioned ; and the jurors aforesaid are not required to settle what shares and proportions of the purchase-money and compensation-money aforesaid, by them assessed as aforesaid, should be allowed to any person or persons having a particular estate, term, or interest therein. Whereupon I, the said sheriff, in pursuance of the said Act of Parliament, do pronounce and give judgment for such purchase-money so assessed as aforesaid by the said jurors, according to the direction of the said Act. In witness whereof," &c.

17,000*l.*, the amount assessed by the jury as the purchase-money of the property required by the company, and that sum was paid by the said bankers into the Bank of England, in the name of the Accountant-General of the Court of Exchequer, to the credit of *Ex parte Henry Taylor, Esq.*, and

the other persons named in the proceedings, and of all

* 621 * other persons interested in the property mentioned in

the inquisition: that on the 18th of June, 1838, the company entered upon and took possession of all the said property, and evicted the defendants and their under-tenants from the premises in the declaration mentioned, claiming title to all the property under their Act of Parliament, and the said warrant, inquisition, and judgment, and the payment of the amount assessed into the Bank of England.

The verdict further found, that all the above-mentioned property was sufficiently described in the plans and books of reference deposited with the clerks of the peace: that all the messuages, lands, and tenements in the said notices and warrant mentioned, as were required by the said Act to be specified in the schedule thereto annexed, were sufficiently specified therein, with the exception of the premises mentioned in the plaintiff's declaration, which the jury found to have been wholly omitted in the said schedule: the verdict then, after finding certain facts as to the situation, description, and occupation of the property so omitted, and setting out a notice by the law-clerk of the company to the plaintiff, defendants, and other persons interested, of an intended application to justices of the peace for a certificate that such omission in said schedule proceeded from mistake, stated, that such application was accordingly made on the 28th of October, 1837, and was attended by the plaintiff, with his counsel and attorney, and that a certificate of such omission by mistake was granted on the same day, under the hands of two justices of the peace: that the plaintiff appealed against such certificate at the general quarter sessions of the peace, by which it was con-

firmed: that the property mentioned in the particulars
* 622 * of the plaintiff's demand, other than the above-mentioned yard and garden, was sufficiently specified in such certificate and schedule thereto: that the yard and

garden (the length, breadth, and boundaries of which were stated) were respectively parcel of and included in the description of the said house, specified in the schedule to the certificate, and occupied therewith as such parcel thereof; but the jury referred to the Court the question, whether they ought to have been specified separately from the said house, of which they found the said yard and garden to have been and to be such parcel as aforesaid, and so included in such description, and occupied therewith as aforesaid. The jury further found, that the company had executed a portion of the railway so as to cross lands of the bishop of Bristol and Joseph Livesey, mentioned in the 57th section; that the railway passed obliquely between streets there called Allen Street and Charles Street, so as to leave a space of twenty-four yards between the railway and Charles Street, but not that space between the railway and Allen Street; but that the company had, before making the railway, purchased the whole of the last-mentioned street and the intervening space; and that that portion of the railway was made in the line delineated in the deposited plans, without any deviation therefrom.

Judgment was entered up by consent on this verdict in the Court of Queen's Bench, for the defendants in error; whereupon the plaintiff brought a writ of error in the Exchequer Chamber, and, after argument there, the judgment was affirmed. (a) The plaintiff then brought the present writ of error.

* *Mr. Kelly* and *Mr. T. F. Ellis*, for the plaintiff in * 623 error. — The Judges of the Queen's Bench gave no opinion on this case; the judgment was there entered up on the special verdict by consent, and a writ of error was brought in the Exchequer Chamber.

[LORD BROUGHAM. — I have never known that course to be taken; the result is, that we have no opinion from the

(a) 2 Q. B. Rep. 978, and 2 G. & D. 846.

Judges of the Queen's Bench on a case from their own Court.]

It is much to be regretted that this course was taken, because this is a case peculiarly proper for the Court of Queen's Bench; the question being, whether an inferior tribunal had jurisdiction, or had duly exercised it.

There never was a case in which the authorities are so uniformly opposed to the judgment of the Court below. The question whether the defendants on the record were duly evicted or not from the premises which they held of the plaintiff turns principally on the 138th section of the Railway Act, which enables the company to proceed in the manner there pointed out to take possession of property of non-consenting parties. That proceeding was resorted to in this case, and an inquisition was taken by the sheriff of Lancashire and a jury; but the inquisition, which is become a record, according to the Act, and deposited among the county records, does not set forth the material requisites of the Act to put the sheriff and jury in motion, and give them jurisdiction. The 138th section enacts, that if any owner or occupier of land required for the railway should not agree with the company as to the amount of purchase-money, or should refuse to accept such purchase-money as the company might offer, and by notice to them in writing should request that the matter in dispute be submitted to a jury, or should,

* 624 * after twenty-one days' notice to him from the company, neglect or refuse to treat, or should not agree with the company for the sale of his interest, or should, by absence from the country, be prevented from treating with them, or be by any impediment incapable of making an agreement or conveyance, or should not disclose his title if required, or in any other case where an agreement for the purchase could not be made, the company might, in any of these cases, issue their warrant to the sheriff to summon a jury to assess the sum to be paid for the purchase of the land, or for compensation for damage. The right of the company to enter upon any lands could, by section 160, arise only upon

payment of the sums "agreed upon or awarded by a jury," in the manner prescribed by section 138; and under this section the jurisdiction of the sheriff and jury to make an award could arise only where there was no agreement between the company and the owners of the land. Another preliminary to the proceeding to such award was notice thereof to the owners and other persons interested in the land. But this inquisition does not state that there was no agreement, nor does it state that notice was given; it merely states, in substance, that the sheriff received the company's warrant and summoned a jury, and they proceeded to assess the damages at 17,000*l*. The mere fact that parties, claiming title under an inquisition, caused the sheriff to summon a jury, cannot raise a presumption, in construing a document of an inferior Court, that there was legal authority for their proceedings. The plaintiff did, it is true, appear at the inquisition, under protest, but his appearance could not confer jurisdiction, which does not appear on this record to have existed at all, except by the fact of its exercise.

* The question then is, whether the tribunal created * 625 under this Act has any privileged exemption from the necessity, incident to all inferior tribunals, of stating in its judgment the grounds of its jurisdiction? The authorities all show conclusively that such defects as these are fatal. In the last analogous case on this subject, *Doe dem. Payne v. The Bristol and Exeter Railway Company*, (a) Mr. Baron PARKE says, in the course of the argument, "The question is, whether it is not enough to state on the inquisition all that is required by the section relating to the inquisition?" "I see the sheriff is to give a judgment; therefore every thing necessary to give him jurisdiction should appear on the inquisition and judgment:" and the judgment of the Court in that case proceeds thus: "The first question which has been raised is whether the inquisition was sufficient? Now it must be admitted, according to the authorities on this subject, that inasmuch as there is to be an extraordinary jurisdiction exercised by the sheriff in giving judgment as to

(a) 6 M. & W. 833, 834.

the amount of the compensation, every thing that was preliminary by the Act of Parliament ought to be set out on the face of the inquisition." Those observations of the learned Baron and of the Court are precisely in point here. In *Rez v. Croke*, (a) the Act 9 Geo. 3, c. 89, for making Blackfriars road, gave power to the "mayor, aldermen, and commons of the city of London, in common council assembled," to treat with the owners and occupiers of land necessary to be purchased for the purposes of the Act; and in case of their

refusal to treat, the justices of the county of Surrey,
 * 626 in sessions, were required, * upon "application of the said mayor, aldermen, and commons, in common council assembled," to issue a precept to the sheriff to summon a jury to assess the value of the lands; notices in writing having been previously given to the parties interested. The order made by the justices stated, that "upon application of the mayor, aldermen, and commonalty," "upon proof of notice being duly given," &c. Lord MANSFIELD, giving judgment, said: "This is a special authority delegated by Act of Parliament to particular persons, to take away a man's property and estate against his will; therefore it must be strictly pursued, and must appear to be so on the face of the order. The first objection is, that 'the mayor, aldermen, and commons, in common council assembled,' have not given an opinion that the lands are necessary to be purchased, nor that an application was made by them to the justices; but that an application was made by 'the mayor, commonalty and citizens.' Now they are two distinct things, &c. It ought to have been stated that the mayor, aldermen, and commons, in common council assembled, had given such opinion, and that an application had been made by them to the justices. There is another objection in point of form; that the order does not state that a notice was given in writing to Mr. Croke, according to the requisites specified in the Act, but only says, 'upon proof of due notice having been given to him,' which is insufficient, a particular notice having been specified by the Act." Mr. Justice ASTON said: "The order is defective for

(a) Cowp. 26.

want of such notice, which is very material; the notice required by the Act ought to have been fully set out and strictly pursued, and it is not cured by his appearance.

* [LORD BROUGHAM. — It appears in *The King v. * 627 The Trustees of Swansea Harbour*, (a) that Mr. Justice LITTLEDALE thought that, from the fact of summoning a jury to assess the purchase-money, a difference or non-agreement was to be presumed; and that the appearance of the party at the inquisition was enough to give jurisdiction; and Mr. Justice WILLIAMS seems to concur on both points.]

That *obiter dictum* of Mr. Justice LITTLEDALE is the only semblance of authority to support the judgment in this case. In *The King v. The Inhabitants of Austrey*, (b) on the validity of a certificate under the Statute 3 Will. 3, c. 30, Lord ELLENBOROUGH says: "In the execution of powers, all the circumstances required by the creators of the power (however unessential even and unimportant otherwise) must be observed, and can only be satisfied by a strictly literal and precise performance. It is also a principle of law, wherever a power is given to any particular persons to do any written act in any particular manner, or in certain particular circumstances, whether it be to parish officers or magistrates, to grant certificates under which, if duly executed, other persons, especially public officers, are bound to act, or to grant warrants or make orders, that their authority must appear upon the instrument itself; it must thereby appear that they are the persons authorized, and that the certificate, warrant, or order was made in the manner and in the circumstances required; otherwise the certificate, warrant, or order is not obligatory, but void." That doctrine is particularly applicable to this case. It appears in *The Queen v. The Manchester and Leeds Railway Company*, (c) that the plaintiff in * this case moved the Court for a *certiorari* for * 628 the purpose of quashing this inquisition, which the Court refused for want of completeness in his affidavits, but

(a) 8 Ad. & El. 448; 1 Perry & D. 515.

(b) 6 M. & Sel. 324.

(c) 8 Ad. & El. 413.

still seemed inclined to think that the objections to the inquisition for want of notice were good ; and in *Regina v. The Committee-men for the South Holland Drainage*, (a) a case of an inquisition taken under an Act similar to this Railway Act, a *certiorari* was applied for to quash the inquisition, because it did not state a notice to treat for the purchase of the land required : the Court refused the application on the ground of bad faith in the applicant ; but Lord DENMAN intimated his opinion that the inquisition was bad, saying, " I think there are, perhaps, two fatal objections ; one, that no notice appears on it ; " and Mr. Justice PATTERSON says, " This case must not be cited to show that notice, and all things necessary to give authority, need not be on the face of the inquisition." In *The King v. The Mayor, &c., of Liverpool*, (b) Lord MANSFIELD says that notice ought to have been given to the parties interested in the lands, and that it ought to have appeared on the inquisition, and also to show that there was a jurisdiction. In *The King v. Bagshaw*, (c) the Court quashed an inquisition and an order of trustees of a road, because it did not appear on the face of the proceedings that any notice had been given to the owners of the land ; for that notice to the parties interested was the foundation of the whole proceedings below, and that, therefore, it should have been stated ; for if no notice had been given, the trustees had no jurisdiction. In *Holt v. Meddowcroft*, (d) a rule was made for a special jury in a cause, and a common jury

* 629 panel being * returned with a special jury panel, and no special jurymen appearing, the cause was tried by a common jury, the verdict was set aside ; and there, also, the appearance of defendant by counsel, but protesting against the trial, was held not to amount to consent ; " because," as Lord ELLENBOROUGH said, " being tied to the stake, and dragged to trial, he endeavours to make the best of it." In *The King v. All Saints, Southampton*, (e) on a question whether the examination of a soldier before justices was admissible evidence, it not appearing on the examination, or

(a) 8 Ad. & El. 429.

(b) 4 Burr. 2244.

(c) 7 T. R. 363.

(d) 4 M. & Sel. 467.

(e) 7 B. & C. 789.

otherwise, that the soldier was, at the time of his examination, quartered where the justices had jurisdiction, Mr. Justice BAYLEY said, "The jurisdiction must appear on the face of the order;" and Mr. Justice HOLROYD added, "The rule that in inferior Courts the maxim 'omnia præsumuntur rite esse acta,' does not apply to give jurisdiction, has never been questioned." In these few words of those learned Judges, the question in this case is put on its true grounds. In *The King v. The Inhabitants of Hulcott*, (a) an order of a justice for discharging a servant from service, under the Statute 5 Eliz. c. 4, was declared void, because it did not appear on the face of the order that she was a servant in husbandry. Lord KENYON there said, "As it does not appear on the face of the order that the justice had jurisdiction, the pauper was not legally discharged from her service."

[LORD CAMPBELL. — Must all those requisites to the jurisdiction in the present case be set out in the warrant to the sheriff?]

If not expressly set out, they must appear by necessary intendment.

[LORD BROUGHAM. — The Judges in the Exchequer * Chamber say that the warrant and inquisition taken * 630 together sufficiently show jurisdiction. (b)]

They cannot be taken together for such purposes; the judgment itself must, on the face of it, show these requisites to the jurisdiction. But the warrant is equally defective in this respect as the inquisition. The objections that have been urged against the latter apply equally to the former, treated either as an independent instrument or as incorporated by reference in the inquisition. The Judge giving his judgment should thereon state the facts on which he exercises jurisdiction, and not refer to an instrument in which the facts, if stated, are stated by another person, and which may be true or not true.

(a) 6 T. R. 588.

(b) 2 Q. B. 1082, 1084.

[LORD COTTENHAM. — Suppose the requisites of the Act not complied with, would the judgment of the sheriff pass the lands, and be binding on the parties ?]

Certainly not. The judgment would be void, as not stating the requisites to the jurisdiction. All the authorities that have been cited show that.

[LORD CAMPBELL. — How can the sheriff know those requisites, unless they are stated in the warrant of the company to him ?

LORD BROUGHAM. — All that the sheriff knows is from the warrant ; if those requisites do not appear on it, is he to know them *aliunde*, and tell the person handing him the warrant that they are not there stated ? That would be dangerous doctrine.]

The sheriff is not here a mere ministerial officer, but at all events he ought to inquire whether the warrant is sufficient. He holds a Court as Judge, with a jury, at the requisition of a private party, for that party's benefit, and examines * 631 witnesses : acting as * Judge in an inferior Court, under an Act of Parliament, he should see that his Court was well constituted, and his jurisdiction well founded. Even a gaoler, receiving a prisoner, must see that the facts essential to imprisonment are stated in the warrant. In *Day v. King*, (a) an order of justices, and warrant requiring payment of money to a person who claimed it as a member of a friendly society, under the Act 49 Geo. 3, c. 12, § 8, was declared bad, as not expressing in terms that the person claiming the money was entitled to it as such member. Even an order of the Lord Chancellor in bankruptcy, under the Statute 6 Geo. 4, c. 16, § 18, must show on the face of it whatever is necessary to give jurisdiction. *Christie v. Unwin*. (b) Lord DENMAN there says, " The order ought to be sufficient on its face to show the authority for making it ; "

(a) 5 Ad. & El. 359.

(b) 11 Ad. & El. 373.

and Mr. Justice COLERIDGE adds: "We cannot intend for or against the order, but must decide according to the words. However high the authority may be, when a special power is exercised, the person who acts must take care to bring himself within the terms of the statute. Whether the order be made by the Lord Chancellor or by a justice of the peace, the facts which give the authority must be stated." That decision is followed and confirmed by the case of *Brancker v. Molyneux*, (a) in the Court of Common Pleas.

There are numerous other cases, equally decisive against the judgment in this case; such as *Rex v. Manning*, (b) *The King v. The Marquis of Downshire*, (c) *Carratt v. Morley*, (d) *The Queen v. Bolton*, (e) * *The Queen v. Spackman*, (g) *Brook v. Jenney*, (h) *The Queen v. Martin*. (i) The effect of all the authorities is that, first, the tribunal, consisting of the sheriff and jury, must be constituted with jurisdiction; and, secondly, the jurisdiction must be shown on the face of the inquisition and judgment. The inquisition here is a judgment recorded, binding the parties for ever; and it is essential that the judgment should show on the face of it that the tribunal had jurisdiction to pronounce it.

Another objection here lies to the certificate of the justices, supplying the omission, in the schedule to the Act, of the yard and garden. Without such certificate as is described in the 7th section, the company had no right to take any lands omitted in the schedule, and yet the inquisition does not show that such a certificate existed. But even if the absence of the allegation, in the inquisition, of the existence of such a certificate could be supplied by extrinsic evidence, the certificate, which is shown in the special verdict, cannot be construed to include "the yard and garden," which were distinguished from the other property in the notice on which the certificate is founded, and which are of a species of property treated in the statute and schedule as distinct from the

(a) 4 Man. & G. 326.

(c) 4 Ad. & El. 698.

(e) 1 Q. B. 66.

(h) 2 Q. B. 265.

(b) Burr. 377.

(d) 1 Q. B. 18.

(g) 1 Q. B. 801.

(i) 2 Q. B. 1037 n.

property which the certificate does specify. And the finding of the jury, that the yard and garden are comprehended in the words used, cannot be sustained as an interpretation of a written instrument created by statute, and taking its signification exclusively from the language of the statute which creates it. But the plaintiff in error also contends * 633 that the whole certificate * is a document not sufficiently accurate or intelligible to have any legal effect, even as to the property therein named. It shows no jurisdiction, nor disagreement between, nor notice to, or attendance by, the parties interested. The same reasons and authorities that have been urged against the validity of the inquisition apply with equal force to the defects in this certificate. Where can there be found any proceeding, adjudication, or order by justices, in which it was not indispensable to its validity to set out their jurisdiction on the face of the order?

[LORD COTTENHAM. — The 160th section vests the lands in the company on payment of the compensation money, and then the defendants on the record could no longer be tenants to the plaintiff in error.]

There was no payment of money according to the Act. The payment is, by that section, to be made "as herein before directed," that is, by section 193, which authorizes the company to order a payment into the bank; but by section 212 all orders of the company should be in writing, and there was no written order of the company here. The money paid into the bank by some of the directors of the company lies there to their use. If the plaintiff in error had taken that money out of the bank, the company might recover it as money had and received to their use, no legal authority having been given so to appropriate the company's funds, and the act of the directors paying it into the bank being wholly unauthorized. The general rule in cases of this sort is, that all the provisions of the Act empowering the company to take to themselves the property of others ought to be strictly complied with; but here, not only are the pro-

visions of the Act not complied with, but in some instances they are violated; for instance, * under section 59 the company were restrained as to the direction of the railway. They have, however, violated the restriction, by carrying it over Allen Street, and cannot now insist upon using the plaintiff's land for the purpose of continuing the railway in a direction which they were forbidden to give to it. The fact of their having purchased Allen Street, as mentioned in the special verdict, might justify the not leaving so great an interval as twenty-four yards between the railway and Allen Street; but cannot excuse the total deviation into Allen Street.

Mr. Earle and *Mr. Tomlinson*, for the defendants in error. — The argument for the plaintiff is, that there is some rule of law requiring all the requisites to the sheriff's jurisdiction under the Railway Act, to be set forth, as well in the inquisition as in the warrant to the sheriff. It is not stated what this rule of law is, but many cases are referred to for the purpose of tracing a *jus vagum*, which is nowhere laid down. Neither is it stated what are the particular requisites that should be set out, though many have been stated from the 138th section. If it were necessary to state in the inquisition all that has been so vaguely suggested, it would also be necessary, in every judicial proceeding under the Act, to give a consecutive history of all the events that happened, and of the matters done under the Act, since the time of its passing. Where or what could be the limit to the statement? What rational purpose could be answered by these formal recitals? If the sheriff were from his imagination to state ever so many matters in the inquisition, the statement of them would not be binding on the parties. It is to be remembered that the warrant is not an act of the sheriff, but is issued * by the company to him. Why * 635 should they state in the warrant all those alleged statutable requisites to his jurisdiction? As well may it be said that the same matters ought to be set forth in the summonses to the jurors and to the witnesses. The argument would be equally applicable to the summonses as to the war-

rant. The sheriff was no more bound to take cognizance of the want of notice of the inquisition, than a Judge at Nisi Prius is of want of notice of trial; in both cases, if the party appears, he is presumed to have waived all objections to want or form of notice. The plaintiff in error, it is true, protested against the sheriff's proceeding; not, however, for want of notice, but because the property required by the company was not within the delineated line of railway, nor mentioned in the schedule to the Act.

The numerous cases that have been referred to may be divided into three classes: 1st, where justices sit to adjudicate between master and servant; 2dly, where they sit to decide some matter concerning a road; and 3dly, where a Judge, as the Lord Chancellor in the case referred to, by an order in bankruptcy substitutes a petitioning creditor for him on whose petition the *fiat* was issued. In all these cases, it is admitted that the respective tribunal, and what constitutes it, ought to be named and stated in the order made. This case does not fall within any of these classes of cases. All the requisites of the statute and rules of law are substantially and sufficiently complied with by the statements set out in the inquisition. What are the facts? There was a demand of the land wanted for the railway works: the parties did not agree as to the price; that is the first step:

the second is, that a warrant is issued to the sheriff to
 * 636 summon a jury to assess the sum to be paid for * the
 land; and the third, that the sheriff does summon a jury for that purpose, and the jury does assess the amount of the compensation money. No one of these is a judicial act: the last, which some of the Judges in the Court below seemed to think a judicial act, is no more than an appraisement; and the sheriff, upon that appraisement or verdict, gives his judgment, which is only to certify that so much money as the verdict finds is to be paid for the land. Objections are taken to this judgment of the sheriff, because the record of it does not state all the minute requisites to all the enumerated preliminary steps. But if the judgment is in substance duly recorded, that is, the verdict of the jury and the judgment on it, what more is necessary or required by

the statute? By what analogy can warrants or orders of justices to arrest or commit parties to prison, on which the superior tribunals require the power of the justices to be fully set forth, be brought to bear on this case, in which no necessity for such superintendence arises? Why should the sheriff, as a judicial functionary, record in his judgment the warrant with which his duty begins, and other preliminary acts, all done by other persons, and of which he has no judicial cognizance?

The cases of *The Queen v. Swansea Harbour* (a) and *The Queen v. The Committee-men for the South Holland Drainage*, (b) in both which similar objections made to inquisitions, under Acts of Parliament for taking lands, were overruled, are precisely in point, and decisive of the present case. An application for a *certiorari* to quash this inquisition was twice refused in the Court of Queen's Bench. (c) The case before the House receives no support from that of *Payne v. The Bristol and Exeter Railway Company*. (d) There, it is true, Mr. Justice LITTLEDALE threw out a *dictum* that all the requisites of the Act should be set out in inquisitions; but the judgment quashing the inquisition was not founded on any such defect, but on the objection that the condition precedent to the taking of any land, namely, the payment of the 1,500,000*l.* subscribed, was not complied with. The cases of *The King v. Croke*, (e) *The King v. Manning*, (g) *The King v. The Mayor, &c., of Liverpool*, (h) *The King v. Bagshaw*, (i) *The King v. All Saints, Southampton*, (k) *Christie v. Unwin*, (l) and other cases that have been cited, are clearly distinguishable from this, and are not applicable. But there are several passages supporting this judgment, in the case of *The Marshalsea*, (m) in *Basten v. Carew*, (n) and in the recent case in the Queen's

(a) 8 Ad. & El. 439.

(c) 8 Ad. & El. 413, 419.

(e) 1 Cowp. 26.

(h) 4 Burr. 2244.

(k) 7 B. & C. 785.

(m) 10 Co. 68.

(b) 8 Ad. & El. 429.

(d) 6 M. & W. 320.

(g) 1 Burr. 377.

(i) 7 T. R. 363.

(l) 11 Ad. & El. 373.

(n) 3 B. & C. 649.

Bench, *Bosanquet v. Woodford*; (a) in which last case an objection was made to the admissibility in evidence of certain returns made by a banking company, under 7 Geo. 4, c. 46, to the Stamp Office, on the ground that the person before whom they were sworn did not describe himself as a person authorized to administer the oath: Lord DENMAN said, "The substance of the transaction is, that the party verifying the return should be, in fact, duly sworn; and therefore, if the person administering the oath really had jurisdiction, the returns, so far as this objection is concerned, were properly received," &c.

In the present case, the facts stated in the special verdict as found by the jury show a full compliance by the * 638 railway company with all the directions and * provisions of the Act on which their proceedings were founded; that in such proceedings was stated every thing which the Act required to be stated in them; and that the company thereby gained a title to the premises in question, by which the defendants in error were lawfully evicted, and their tenancy under the plaintiff determined. Upon the face of the various proceedings set forth in the special verdict, the jurisdiction to adopt those proceedings sufficiently appears, expressly or by fair and necessary intendment. If there is any formal defect of statement to warrant such proceedings, such defect is supplied by the special findings of the jury in the special verdict; showing that all which was necessary to give jurisdiction under the statutes did really and in fact take place. And such defect, if it existed, would only subject such proceedings to be quashed for want of form by *certiorari* or other proceeding in the nature of a writ of error, and cannot now be relied upon as wholly avoiding them, especially in a proceeding against third parties, against whom the recorded and unreversed judgment founded on those proceedings has been enforced.

As to the omission in the schedule to the Act; such omission was supplied by the certificate of the justices and

(a) 22 L. Jour. 93, 96.

schedule thereto, set forth in the special verdict; and the omission in the last-mentioned schedule of the yard and garden is cured by the finding of the jury that they are and were parcel of and included in the description of the house specified in that schedule.

Mr. Kelly, in reply.—The two main points are, first, whether all the requisites to the jurisdiction should appear on the inquisition; secondly, whether the jurisdiction does actually appear on it. The Exchequer Chamber held that it does sufficiently appear, * without saying that * 689 it should appear. The counsel for the defendants in error, apparently doubting the correctness of that judgment, have supported the second point only, contending that it is not necessary that the jurisdiction should appear. It is submitted for the plaintiff, that in all judgments pronounced by inferior tribunals, their jurisdiction must be set forth, to enable the superior Court, in reviewing such judgments, to see whether the jurisdiction existed, and was properly exercised; otherwise, how could an inquisition be traversed? The sheriff proceeding in this case on the company's warrant as his authority was bound to see that it gave him authority to proceed. The warrant should, for that purpose, recite the want of agreement between the company and the plaintiff, as to the sum to be paid for the land; and the other requisites of the statute, all which must appear on that instrument, as the sheriff's authority to summon a jury to assess the sum. And he again should, in the inquisition and judgment, recite the warrant and the notice directed by the Act, of the time and place of holding the inquisition. The warrant and the inquisition are governed by the same principles and authorities.—[He then proceeded to cite some of the cases which have been before referred to.]

September 4.

LORD BROUGHAM.—This was a writ of error from a unanimous judgment of the Court of Exchequer Chamber. A special verdict had been found at the trial, and judgment was entered up in the Queen's Bench, of consent, without any

argument, in order that the writ of error might be brought at once. It is to be lamented that this course has been taken, as we are thereby deprived of the light which might
 * 640 have * been thrown upon the question by that Court, of all others the most practised in the discussion of the points raised in this case. The principal point raised refers to an inquisition which was taken under a local Act, 6 & 7 Will. 4, c. 111, for making a railway between Manchester and Leeds; and the main ground of the objection taken here, as before taken in the Court below, is that the jurisdiction of the Court, the sheriff and jury, which took the inquisition and gave judgment upon it, is not duly set forth; so that this Court and the Courts of Queen's Bench and Exchequer Chamber have no means of knowing that the inferior Court had the jurisdiction which it exercised.

Now it cannot be doubted, that where a Court of limited jurisdiction, limited either in point of place or of subject-matter, assumes to proceed, its judgment must set forth such facts as show that it has jurisdiction, and must show also in what respect it has jurisdiction. But it is another thing to contend that it must set forth all the facts or all the particulars out of which its jurisdiction arises. Thus, if a power of commitment or other power is given to two justices of a county, their conviction or their order must set forth that they are two such justices of such county, in order that it may be certainly known whether or not they constitute the tribunal upon which the statute they assume to act under has conferred the authority to make that order or to pronounce that conviction.

In this case, it is set forth in the inquisition that its caption was before the sheriff of the county palatine of Lancaster, and was pursuant to the Act, citing it by its year and title, and in pursuance of a warrant made under the seal of the railway company and directed to the sheriff, which warrant is annexed and forms part of the inquisition; that the
 * 641 jurors were * qualified to try issues in the Courts of Record at Westminster (which is the qualification required by the Act), and that they found and assessed a certain sum, namely, 17,000*l.*, as the sum to be paid by the com-

pany to the owner of the land to be taken by the company, — to the plaintiff in error; and that the sheriff gave his judgment for such sum so assessed, according to the direction of the Act. It is not denied that the Act gives all this jurisdiction; but it is said that before any jury could be impanelled under the Act it was necessary that there should have been a disagreement between the parties; and that no such disagreement being set forth, the condition precedent to the jurisdiction vesting under the Act, is wanting. It is further objected that the notices were not sufficient, not being such as the Act requires.

It is, however, to be observed, that the mere impanelling a jury, and instituting the inquiry, seems a sufficient evidence of a disagreement. It is necessary that the jurisdiction should appear, but there is no particular form in which it must be made to appear. The Court above, which has to examine, and may control the inferior Court, must be enabled somehow or other to see that there is jurisdiction, such jurisdiction as will support the proceeding; but in what way it shall so see is not material, provided it does so see. This is the language of the Court of Queen's Bench in one of the cases cited and mainly relied upon by the plaintiff in error, but cited for another purpose, namely, *Rex v. The Mayor and Corporation of Liverpool*; (a) and in *Rex v. Manning* (b) it is said that the authority must appear on the face of the order, though no express adjudication may be necessary.

* In the case of *Rex v. The Trustees of Swansea Har-* * 642
bour, (c) one objection of many that were taken was the very objection now under consideration. It was said that the fact of disagreement did not sufficiently appear; but Mr. Justice LITLEDALDE said it did appear, else why was a jury summoned? And Mr. Justice WILLIAMS agreed with this view. It is said that these were *obiter dicta*. But to this it must be replied, that the objection having been specifically taken, the opinion of the learned Judges, in displacing that objection, is not *obiter*; it is their answer to the objection,

(a) 4 Burr. 2244.

(b) 1 Burr. 877.

(c) 8 Ad. & El. 489.

which would have put an end to the case if it had been allowed. It is their decision upon one of the points, and a cardinal point in the cause; upon which point the cause might have been, and must have been annihilated, if they had not given that answer to the objection. Now both those learned Judges overruled the objection, and no other Judge objected to what they laid down; therefore the whole Court must be taken to have overruled that objection, taken and argued before it, and to have disallowed it upon the ground stated, — a ground quite as applicable to this objection as it was to the objection taken there. And Mr. Justice WILLIAMS adds, that the parties appearing by counsel was a complete answer to any want of preliminary circumstances; that is, circumstances before the caption of the inquisition, such as that of notice; and he is fully borne out both by all principle and by all authority in this opinion, an opinion applicable likewise to the present case: by principle, for no Court ought ever to sanction a party coming into a Court and taking his chance of prevailing there, reserving his objection to the proceeding for want of notice, for example, or any
 * 643 other matter *in pais*; and * then, when he is disappointed, turning round and objecting, either that there never had been a disagreement, or that he had no notice to attend. He did attend; he thus waived the claim to notice; and he must not be heard to deny that he had that sufficient knowledge of the proceeding which his act, his attendance, proves him to have had, or, which is the same thing, proves him to have been wholly indifferent about. By the authority of decided cases the same position is equally supported. In *Rex v. Bagshaw*, (a) relied on by the plaintiff in error, an inquisition was sought to be quashed upon motion, because the Act under which it had been taken had required twenty days' notice. On cause shown against the rule which had been obtained upon this ground, the counsel in support of the inquisition relied on the fact of counsel appearing for the other side, as a waiver of the notice: but the Court said that it did not appear on the face of the inquisition (and of course

(a) 7 T. R. 863.

the Court in that case could only have the inquisition before it) that the defendant's counsel had appeared; it merely set forth, said their Lordships, "that counsel and evidence had been heard; and *non-constat* (said the Court) that any were heard except for the plaintiff, which clearly would be no waiver." Therefore the rule was made absolute for quashing the inquisition. But it is quite plain that if it had appeared that the defendant's counsel had attended, this would have been held a waiver, and the rule would have been discharged.

But all the cases of waiver are cases for the defendants in error here. With respect, for instance, to all defects in that process which is the foundation of a suit, I hardly know any such defect which may not be cured by the party appearing to it, and attending * as if he had had his no- * 644 tice, and as if the process were valid. I remember a case which I looked at lately, with a view to another point entirely, the case of *Harris v. Mullett*; (a) a most grievously fatal defect was in the process there. It was an action of trespass; and the writ with which the party was served set forth that he was summoned to attend on the first day of Saint —, without saying whether it was St. Martin or St. Hilary, or, in short, what Saint it was, on whose matin or morrow the defendant was desired to appear. He took this objection, and the Court said, "That is a very good objection, no doubt, and the process ought to be set aside for irregularity." Oh, but, says the other party, I have an affidavit here, which shows that upon his being served with the process calling upon him to appear on the morrow of Saint —, he sent his wife — which he did not deny that he had done — to the sheriff or officer on the other side, to say that he would take the proper steps and pay the money wanted. "Then," said the Court, "he has gone a great deal further than was sufficient to waive the notice." If he had relied upon the blank in the Saint's name, he ought not to have sent that message to the Court's servant. And so the Courts have lately held with respect to all defects in pleading. There is a rule to that effect in each

(a) 1 Taunt. 59.

of the three Courts, — the Queen's Bench, Common Pleas, and the Exchequer. After an Act which I brought into this House in 1832, respecting the new forms of pleading, they made a general rule that when any one step is taken by a party after an irregularity known to him, that step should be a waiver of the irregularity; which I must take leave

* 645 to say is rather to be held as a declaration * of the common law as to irregularities in general than a new rule introduced; because it is the constant and invariable rule in all Courts of Equity, as well as of Law.

It is clear by the special verdict in the present case that the plaintiff in error did appear, and that he gave evidence as to the value of the parcels in question. He is found to have attended by his counsel, and to have examined witnesses to that value. He attended, indeed, under protest, but he did not protest that there had been no disagreement, or that due and sufficient notice had not been served upon him; his protest was distinctly confined to one point. The protest is set forth in the verdict; and upon looking at it, I find that it was a denial of the company's right to take the lands and messuages, and the sheriff's right to assess their value, solely on the ground that the premises were not sufficiently described in the books deposited, or in the schedule to the Act; but there was no protest whatever, either for want of agreement or want of notice. This protest, therefore, instead of operating against the attendance by counsel being taken as a waiver, is the best confirmation of the waiver; because it confines the objection taken against the proceeding to matters respecting which either the jury made no inquiry or the objections now relied upon had no application.

It appears to me, upon the whole, that the judgment pronounced in the Exchequer Chamber was correct, and ought to be affirmed by this House, giving judgment for the defendants in error.

LORD COTTENHAM. — If the arguments of the plaintiff in error be well founded, the railway company acquired
 * 646 no title to the lands in question; and that, not * from any omission of what the Act required them to do for
 [544]

the purpose of acquiring a title, but from a defect in the form of the inquisition by which the value of the lands was assessed. If the objection be fatal to the title of the company to these lands, there can be no doubt but that similar objections will be found to apply to very many titles derived under the various Acts of Parliament which have, of late years, been in operation for the carrying on of public works.

The special verdict finds that every thing was done which the Act required for the protection of the owner of the property: the question, therefore, is purely one of form, which, if successful, would be destructive of the real merits of the case. This (although no reason for departing from any established rule) may properly be taken into consideration, if the case do not fall within the principle of decided authorities.

The first objection to the title of the company is, that the inquisition, ascertaining the amount of the purchase-money, does not show that there was any authority under the Act for such a proceeding; that is, that it does not allege that the parties had not previously agreed upon such amount: for the absence of an agreement for that purpose was all that the Act required to justify the warrant, and to give jurisdiction to the sheriff and jury. Now the warrant, which was referred to and annexed to the inquisition, required the sheriff to impanel and swear a jury for the purpose of inquiring, assessing, and giving a verdict for the sum of money to be paid: and by the inquisition taken in pursuance of this warrant, the jury find, assess, and give their verdict for the sum of 17,000*l.* to be paid for the purchase of the premises, by the said Act of Parliament authorized to be taken by the said company; and the sheriff thereupon * pronounces * 647 and gives judgment for such purchase-money, according to the directions of the Act. It certainly does not in terms negative the fact of the parties having previously agreed upon the amount of the purchase-money, but it states that which is utterly inconsistent with any such fact. If the amount of the purchase-money had been previously agreed upon, the jury could not have assessed, and the sheriff could not have adjudged, the amount of such purchase-money.

Whatever form might have been gone through, the amount of purchase-money would have been that which had been adjudicated upon. It will not be found, upon an examination of the cases, that any inquisition had been held defective for not alleging a fact necessarily implied from those which are alleged ; and if that be so, there cannot be any ground for doing so for the first time in the present instance. This was the ground upon which the Judges in the Exchequer Chamber held the proceeding to be free from objection upon this point, and which was before them, and now is sufficient to dispose of the first objection raised. Had this not been so, it would have been proper to consider whether it can be necessary in any case that there should be, on the proceedings, averments of facts, into which the parties had no authority to inquire, and of which, therefore, they could have no judicial knowledge.

I will now shortly examine the cases which have been relied upon as applicable to these points. In *Rex v. Manning*, (a) the notice stated was not that which the Act required, but the judgment proceeded upon other objections. In *Rex v. The Mayor of Liverpool*, (b) the notice was to be given by the sheriff; and as none was stated, the in-

* 648 quisation was quashed. In * *Rex v. Bagshaw*, (c) the notice was to be given by the trustees, who were to summon the jury and to adjudge. In *Rex v. The Inhabitants of Hulcott*, (d) an order of justices discharging a servant from her service was held bad, because it did not state that she was a servant in husbandry, — a fact upon which it was said their jurisdiction depended, and which it was their duty to ascertain. In *Kite v. Lane*, (e) the objection was that the conviction did not show that the justices were of that district to the justices of which alone the Act gave jurisdiction. In *Rex v. The Parish of All Saints, Southampton*, (g) the jurisdiction of the magistrates to take the examination of the soldier depended, under the Mutiny Act, upon the fact of his

(a) 1 Burr. 877.

(b) 4 Burr. 2244.

(c) 7 T. R. 863.

(d) 6 T. R. 553.

(e) 1 B. & C. 100.

(g) 1 Man. & R. 663 ; 7 B. & C. 785.

being quartered at Southampton, — a fact which they were bound to have ascertained, and which, not being stated in the examination nor proved *aliunde*, rendered the examination inadmissible in evidence. In *Day v. King*, (a) the facts that the applicant was a member of a friendly society, that he was entitled to the money, and that the party against whom the application was made was an officer of the society, were held to be not only necessary to give the justices jurisdiction, but formed part of what they had to decide; and yet these facts were not stated in the order, which was therefore deficient. In *Rex v. The Trustees of the Norwich Road*, (b) the inquisition was to be taken before the trustees, who were the parties to give the notice, and the judgment was not upon that point. In *Doe dem. Payne v. The Bristol Railway Company*, (c) the inquisition did state the notice to * treat, and the * 649 neglect to do so; the only point decided affecting the case was, that whatever was made necessary by proviso need not be stated; which may be material as to another part of this case. In *Regina v. The Committee-men of the South Holland Drainage*, (d) the decision did not turn upon the words of the statement as to a notice to treat; the Court being of opinion that the party was estopped from taking this objection. Lord DENMAN, indeed, intimated an opinion that such notice to treat ought to have been stated, for the purpose of showing jurisdiction. It is, however, to be observed, that the trustees who were to hold the inquisition were also the parties to give the notice; in stating it, therefore, they would not be stating the acts of others, of which they had no judicial knowledge. In *Regina v. The Trustees of Swansea Harbour*, (e) the facts were precisely the same as in the present case: the inquisition was silent as to any notice to treat, or non-agreement, the issuing of a warrant, or any of the circumstances necessary to give the jury and the sessions jurisdiction. The objection was made, and Lord DENMAN, though he relied much upon the ground that the trustees who obtained the inquisition could not object to it, observed that

(a) 5 Ad. & El. 359; 2 Har. & Wol. 128.

(b) 5 Ad. & El. 563.

(c) 6 M. & W. 320.

(d) 8 Ad. & El. 429.

(e) 8 Ad. & El. 439.

he was not prepared to say that the inquisition was not good; and Mr. Justice LITTLEDALE and Mr. Justice WILLIAMS held that the inquiry stated in the inquisition assumed the disagreement, and that that was sufficient. The opinion of Lord DENMAN, that he was not prepared to say that the inquisition was not good, is the more important, because it fell from him after the case had been before him upon an application for a

certiorari, upon which occasion he had used expressions
 * 650 favourable to the applicants. In *Regina v. The * Manchester and Leeds Railway Company*, (a) the decision did not touch the point. The case of *Rex v. Croke* (b) was much relied upon by the plaintiff in error. The point upon which the judgment there seems to have rested, was the error in the style of the Corporation of London. But Lord MANSFIELD suggested an objection, which had not been raised at the bar, that the statement of the notice of the proceeding before the jury was defective. The Act did not specify by whom the notice was to be given, but I assume that it ought to have been given by the Corporation of London. It was, therefore, not an act to be performed by those who were to hold the inquisition; and if held necessary to be stated in it, would be an authority in favour of the proposition of the plaintiff in error. It does not, however, appear to have been the ground of the decision, and certainly was not the subject of argument. That case is, however, remarkable in this respect, that in that as in this case resort to a jury was only to be had if the parties did not agree as to the purchase, "refusal or inability to treat" being the terms used; but upon that subject the inquisition was as silent as in the present: and yet neither from the bar nor from the Bench does any objection appear to have been suggested upon this point, which is the principal one relied upon in the present case.

I have now examined all the cases which have been relied upon on either side, and the result appears to be, 1st, that if it be necessary that the inquisition should state the absence of an agreement between the parties, what appears upon the present inquisition was, in *The Queen v. Swansea Harbour*,

(a) 8 Ad. & El. 418.

(b) Cowp. 26.

decided to be sufficient, and in *The King v. Croke* was assumed to be so, from the objection not having been taken; * 2d, That, except in what fell from Lord * 651 MANSFIELD in the latter case, and from Lord DENMAN in the case of *The Queen v. The Committee-men of the South Holland Drainage*, (a) there does not appear to be any authority for holding that the inquisition or other proceeding need state any matter not cognizable by the authority whence such proceeding emanates; and all reasoning appears to be against any such rule. The instances referred to by Lord ABINGER (b) in the Court below prove that such preliminary matters were not cognizable by the sheriff and jury, and could not be the subject of proof before them. How, then, can it be necessary or proper that their inquisition should state facts of which they could not have received any proof, particularly when, by the 138th section of the Act, and the authority of *Basten v. Carew*, (c) such statement would have been conclusive?

It appears to me, therefore, that the first objection cannot be supported.

A second objection was raised in argument in this House, which I do not see noticed in the report of the case before the Exchequer Chamber; and that is the want of any statement as to notice of the proceeding before the jury, as required by the 138th section. This, if not removed by the observations before made, will be answered by the case of *Doe dem. Payne v. The Bristol Railway Company*, (d) which decided that what was made necessary by way of proviso in the Act, need not be alleged in the proceeding; but the want of it was to be brought forward by the objecting party. The affidavits show that no such case exists in point of fact.

* Upon the other objections I do not think it neces- * 652 sary to make any detailed observations, being of opinion that they are satisfactorily answered by the Lord Chief Justice of the Court of Common Pleas, in the judgment in the Court of Exchequer Chamber; and with respect to the objection as to the payment of the 17,000*l.* into the Bank of

(a) 4 Ad. & El. 429.

(b) 2 Q. B. 999.

(c) 8 B. & C. 649.

(d) 6 M. & W. 820.

England, it appears to me that there was a payment in fact, and that the provisions of the Act have been sufficiently complied with.

I am, for these reasons, of opinion, that the judgment should be given for the defendants in error, with costs.

The judgment of the Court of Exchequer Chamber was accordingly affirmed, with costs.

* 653 * MARQUIS OF WATERFORD v. KNIGHT.

1844.

HENRY DE LA POER, MARQUIS OF WATERFORD,	}	<i>Appellants.</i>
and Others		
THE REV. THOMAS KNIGHT, Clerk		<i>Respondent.</i>

Tithes ; Account. Customary Payment. Legal Title.

To a bill filed by the rector of F. for an account and payment of tithes, the defence was that the lands occupied by the defendants comprised the manor of F., which was within the rectory of F., and that from time immemorial the owner for the time being of the manor had paid to the rector the yearly sum of 40*l.* for maintenance of Divine service there, for and in lieu of all manner of tithes arising within the manor: and that the owner for the time being of the said manor, or his assigns, had, from time immemorial, in respect of the said yearly sum, used to have, and ought to have, the tenth of all tithable things arising within the said manor.

The evidence in the cause showed payments to the rector of 40*l.* yearly for upwards of 150 years, and pernaney of the tithes by the owner of the manor for upwards of 180 years, previously to the filing of the bill; and also that in the year 1686 a bill by the then rector of F. for the tithes of the manor was dismissed upon the same defence.

Held by the House of Lords (reversing a decree for the account) :

1st. That as the account for tithes is merely incident to the rector's legal title, a Court of Equity cannot interpose in his favour until he has established his right at law.

2d. That where a defence to a suit in equity for tithes raises a doubt as

to the rector's legal title to them, the course of a Court of Equity is to retain the bill for a specified time, and leave the rector at liberty to establish his title by an action at law within that time.¹

Pleading. Statutes.

8d. That a party who mistakes his right, and sues in a wrong form, is not entitled to an order that would deprive the defendants of the benefit of any alterations made in the law in the mean time.

April 29, 30; May 6, 7, 9, 10, 14, 17, 20, 21; September 5, 1844.

THE original bill in this case was filed in the Court of Exchequer² in the year 1830, by the respondent, as rector of the parish of Ford, in the county of Northumberland, against the appellants, and others since deceased, as occupiers of lands within that parish, for an account and payment of great and small tithes for the six preceding years.

* The Marquis of Waterford being then a minor, (a) * 654 answered separately by his guardian; the other appellants, who were his Lordship's tenants, put in a joint and several answer. The defence set up by the answers was, that the parish of Ford was a rectory, and comprised within its boundaries or precincts (amongst other lands) the manor of Ford: that the said manor had always, as the defendants believed, from time whereof the memory of man was not to the contrary, contained within its boundaries upwards of 8000 acres of land altogether, then producing, as the defendants believed, an annual rental of 10,000*l.* and upwards: that the whole of the said 8000 acres of land contained in the said manor had always been, from time whereof, &c., and was still, situated within the said parish of Ford: and

(a) For the proceedings and result of a bill filed against his Lordship on attaining his majority in 1832, for discovery in aid of this suit, see 2 You. & C. 22; and Vol. III., *ante*, p. 27.

¹ By the present English practice in chancery, the legal right in such cases must be determined by the Court of Chancery; unless, under the peculiar circumstances of the case, the Court is satisfied that the question can be more conveniently tried in a Court of Common Law. 2 Dan. Ch. Pr. (4th Am. ed.) 1071 and note (1), 1110, 1642.

² The equity jurisdiction of the Court of Exchequer has now been transferred to the Court of Chancery. 1 Dan. Ch. Pr. (4th Am. ed.) 6, 7.

that from time whereof, &c., there had been, as the defendants believed, always payable by the lord or owner of the said manor for the time being, and such lord or owner for the time being had, as the defendants believed, always, until the time after mentioned, paid by equal half-yearly payments, at Lady-day and Michaelmas-day in each year, or so soon after as the same was demanded, to the parson of the said parish for the time being, the yearly sum of 40*l.* for maintenance of Divine service there, for and in lieu and in contentation of all manner of tithes arising, &c., within the said manor: and that the lord or owner of the said manor for the time being, or his assigns, had, as the defendants believed, always, from time whereof the memory of man was not to the contrary, used, in respect of the said yearly sum of 40*l.* so paid to the parson of the said parish, to have, and of right

* 655 * ought to have, the tenth of all tithable things arising, &c., within the said manor of Ford, or any part thereof.

It was further stated in the answers, among other things, that in 1768, the then lord or owner of the manor of Ford conveyed a part of the lands of that manor, together with the tithes, to Adam Askew in fee, and that the tithes of those lands had ever since been received by him, and those claiming under him. (These were defendants in the cause, but not parties to this appeal.)

It appeared by the admissions in the cause that the respondent had been rector of the parish of Ford from the year 1819: that Lady Delaval (Marchioness of Waterford and mother of the appellant) was then, and up to her death in 1827, lady of the manor of Ford and patroness of the rectory: that upon her death the marquis became and still continued to be lord of the manor and patron of the rectory, and that he occupied lands within the same from the year 1827.

The evidence for the appellants of the payment of 40*l.* a year, in lieu of all tithes, consisted, 1st, of receipts given by successive rectors (including the respondent) of the parish from the year 1698 to 1822, when the respondent refused to receive the same; 2dly, of terriers, one dated in 1792, another in 1806, signed by the respective rectors; 3dly, of accounts

kept by stewards of the lords of the manor of Ford, for the years 1765, 1775, 1776, 1781, 1788, 1796, and thence to 1806, and for several subsequent years, in which accounts were entries of payments to the rector for the time being of 20*l.* for the "modus" or "half-year's modus," and receipts of tithes by the lords of the manor; 4thly, of rental, cash and tithe books, from 1753 to 1822, in which were contained * entries of half-yearly payments of the 40*l.* a * 656 year to the rectors of the parish for the time being, and of the receipts of tithes by the lords of the manor; 5thly, of proceedings in two suits, instituted by rectors for those tithes in 1678 and 1683, from which it appeared that there had been payments of the 40*l.* by the lords of the manor to the rector of the parish for the time being during 240 years and upwards, and that the first of the suits was abandoned by the rector, and the latter was dismissed in 1686.

The additional evidence to prove that the lords of the manor of Ford were the owners of all tithes within that manor, consisted of various accounts and documents, showing their dealings with the tithes in various ways, as by taking them in kind, and appropriating them to their own use; by leasing them; by mortgaging them; by selling them; by levying fines and suffering recoveries of them; and by making them the subject of family settlements.

The cause was heard before Mr. Baron ALDERSON, who decreed for an account and payment of tithes to the respondent, with costs. (The material proofs, the arguments on both sides, and the judgment, are fully reported in 4 Y. & C. 283 *et seq.*)

The appeal was against that decree, and was argued during several days in the months of April and May, 1844, by *Mr. Bethell* and *Mr. Purvis* for the appellants, and by *Mr. Boteler* and *Mr. Simpkinson* (with whom was *Mr. L. Lowndes*) for the respondent.

(It is unnecessary to report the arguments, as they did not differ materially from those urged in the Court below, before referred to; and as the House did not give any judgment on the merits.)

September 5.

* 657 * LORD COTTENHAM. — Being of opinion that the decree directing an account of tithes cannot be sustained, and that the utmost that a Court of Equity, under the circumstances of this case, could properly have done, would have been to retain the bill, giving the plaintiff liberty to bring such action at law as he might be advised, I should have abstained from any observations upon the merits of the case, did it not appear to me that this decree, and some others which have lately come before this House from the Court of Exchequer, (a) whilst it exercised an equitable jurisdiction, if not observed upon here, might be hereafter quoted as overturning or weakening a doctrine which I consider as one of the leading principles upon which the jurisdiction in equity is exercised. But as this case, if it is to be tried elsewhere, ought to go to that trial with as little prejudice as possible from any thing that passes here, I will abstain from saying more than is absolutely necessary for the purpose of explaining the object I have in making any observations at all. And to guard against the possibility of the plaintiff sustaining any prejudice, I will take the facts of the case as they are represented by the learned Judge who decided in his favour.

The plaintiff rests his title to the tithes upon his common-law right as rector; the defendant sets up a title to the tithes themselves upon a supposed arrangement between the lord of the manor and the rector at a time when the law permitted it, supported by immemorial usage, by which the rector was to receive 40*l.* in lieu of the tithes, and the lord of the manor was to be entitled to the tithes, — a defence, the validity of which, after the decisions referred to, cannot be disputed if supported by sufficient evidence, unless

* 658 * the claiming of the custom as including the lord's assigns should be held to distinguish this case from those cited, and to make the prescription illegal.

In support of this alleged prescription, the learned Judge

(a) As *Byron v. Cooper*, *ante*, 556.

states that he thinks the defendants have proved payment of the 40*l.* per annum to the rector for upwards of 150 years ; and pernaney of the tithes by the lord, and dealing with them as his property for 180 years. There is, then, a suit in the Exchequer by a lessee of the rector claiming these tithes ; and a defence set up precisely as laid in this case, and a decree dismissing the bill in the year 1686. The learned Judge minutely examined the facts proved, and stated that he had come to the conclusion that the defendants had not made out satisfactorily the prescription in point of fact ; and, observing that the question depended upon documents almost entirely, said he thought it would be absurd to send to a Judge and jury at *Nisi Prius* to determine off-hand a mere question of fact, which depended upon a careful examination of documents. If such circumstances had occurred in a case of purely equitable cognizance, I should have agreed very much in the opinion expressed as to the impropriety of sending such a matter to a trial at law ; and a Court of Equity in such a case never does adopt such a course : my objection is to the application of these observations to the case before us.

The defendant claims a title to the tithes as his freehold and inheritance as legally vested in him, and those through whom he claims from time immemorial. Over such a question a Court of Equity has no original jurisdiction ; it can only come before such a Court incidentally. The jurisdiction of a Court of Equity in such a case is confined to the account incident to the title to the tithes, if such a title should be *found to be vested in the plaintiff, * 659 and not in the defendant. In such a case, if there be a real question of title to be decided, a Court of Equity abstains from assuming any jurisdiction over it ; there are many similar instances of the course of practice. Persons entitled to patents and copyrights have often a right to an account in equity against those by whom they are infringed ; but it is not the practice of the Court to take upon itself the duty of deciding upon adverse claims to such rights, but it withholds its interpositions as to the account until the right to which it is incident has been established at law. The case of adverse

claims of title to tithes is similar, and is established in several cases, some few references to which will be found sufficient to prove it.

In *Scott v. Airey*, (a) the defendant set up a title to a portion of tithes, supported by evidence of long possession and pernancy: the Lord Chief Baron said: "It does not appear how the Ridleys became entitled; but it appears that, being in possession, they settled, mortgaged, and devised the tithes as their own absolute property. If, notwithstanding this long possession, the plaintiff is legally entitled, he is not without remedy. But it is too much in a case of this kind in a Court of Equity to interpose, and, after so long a possession, to take the property from the possessors, and decree the rector entitled to it," &c., until the right be established at law; and the bill was dismissed. *Edwards v. Lord Vernon* (b) is to the same effect. In *Strutt v. Baker* (c) the defence was possession of the lands and pernancy of the tithes; and Lord

ROSSLYN, after observing that "the ground upon which
* 660 the * Court interfered as to tithes is the account where the general right to the tithes is not in controversy;" and that "upon the circumstances of long possession and apparent title upon the face of the deeds, family settlements, and leases for a long time, he would not, in a Court of Equity, interpose to affect it, and aid a person coming to disturb it," said, "There is no ground for an issue; for a Court of Equity, giving the least succour to break through the fences that by law the party is entitled to maintain, would act against its own principle, and disturb instead of quieting possession." In *Foxcroft v. Parris*, (d) a similar case, Lord ALVANLEY said: "The principle is clear that the account only arises upon the legal right; and if there is *prima facie* evidence against it, it must be proved by law, if there is the least doubt, before the Court will act upon it. I never will in such a case decree an account, if the least doubt appears upon the legal right, before it is established." And he proposed to the plaintiff to retain the bill, with liberty to

(a) 3 Gwil. 1174; see p. 1175; s. c. 2 Eag. & Y. 342.

(b) 2 Eag. & Y. 344 n.

(c) 2 Ves. Jun. 625.

(d) 2 Eag. & Y. 487.

bring an action under the statute ; but the plaintiff preferred that the bill should be dismissed.

In *Norbury v. Meade*, (a) Lord REDESDALE said, “ The decision of the Court of Exchequer in this case is upon a legal right.” “ Now in what case is a Court of Equity authorized to decide on a legal right ? There is no equity in the case of tithes ; it is merely an incident to a right to an account.” “ The Court of Exchequer had no right to decide the question ; it is a legal question, which ought to be decided in a Court of Law, if there really is a question of right.” And Lord ELDON, (b) referring to *Scott v. Airey* and other cases, said that these cases had determined, “ that * if * 661 a person shows that he had a pernancy or enjoyment of tithes, and that he had not paid them to the rector, and can show by his title-deeds that the tithes of his land have been made the subject of conveyances, &c., that it is not fit that a Court of Equity should make a decree or interfere, but leave the party claiming to make out a title at law.” The bill was dismissed without prejudice to the respondents demanding the tithes in any other suit. In *Cherry v. Legh* (c) it was held, that if no occupier show a colour of title to the tithes not rendered, a Court of Equity will not interfere, but leave the plaintiff to his remedy at law ; and Lord ELDON, referring to what had been decided in *Scott v. Airey* upon this point, said he believed that no case had been decided in equity contrary to that. In *Hughes v. Davies* (d) the title to the tithes was set up by the defendant, and the Vice Chancellor said : “ It is unquestionable law upon all the authorities that an account for tithes is only given in this Court as a consequence of the title of the plaintiff being clearly made out ; and, if there is any reasonable doubt of the extent of his legal right, that this Court will not act until the right is established at law.” “ The result of all the cases seems to me to be this, that if there has been an adverse retainer of tithes, grounded upon an allegation of title, to which title colour is given by the production of old instruments, this Court will not inter-

(a) 3 Bligh, 245.

(c) 1 Bligh, n. s. 309.

(b) 3 Bligh, 251.

(d) 5 Sim. 349.

fere even on behalf of a spiritual rector, without he proves his title at law." The order made in that case was, "that the bill be retained for twelve months, with liberty for the plaintiff to bring such action as he shall be advised;

* 662 and in case the plaintiff shall not proceed * to trial in such action within that time, that the bill be dismissed, with costs ; but if he shall proceed to trial within that time, then that the consideration of costs and further directions be reserved ; either party to be at liberty to apply to the Court."

It is impossible to reconcile what was done in the Exchequer in the present case, with what has, upon these authorities, been declared to be the practice of Courts of Equity. It is impossible to say that there is not a serious question of title between these parties ; which therefore, upon these authorities, a Court of Equity ought not to assume the province of deciding, or of directing an account, until the plaintiff has established his title at law. Acting upon the principle so laid down, and the practice of Courts of Equity in similar cases, the proper course for us is, not to direct an issue, — which assumes jurisdiction and seeks the aid of a Court of Law as to the mode in which it ought to be exercised, and which does not leave the ultimate disposal of the legal title to the Court of Law, whether upon an application for a new trial or on the ultimate judgment ; but to retain the bill for a limited time, with liberty for the plaintiff to proceed at law and establish his title, if he can.

In most of the cases referred to, the bill was dismissed. I see no reason for doing so ; if the plaintiff should succeed, it would make it necessary to file a new bill for the account. The mere retaining the bill cannot prejudice the question, as the order is not founded upon any doubt entertained by the Court, which the directing and issue might imply ; but simply because the Court withholds its equitable jurisdiction where it is only in aid of a legal right, until such right be established at law.

I think the order in this case should be the same
* 663 * as was pronounced in the case of *Hughes v. Davies*, as before stated.

THE LORD CHANCELLOR. — I certainly agree in the principle stated by my noble and learned friend. I believe the learned Judge took upon himself to decide the question from the best motives and feelings towards the parties, but I think he did that which the course of precedents does not justify or warrant; and therefore I think that the opinion expressed by my noble and learned friend is perfectly right, and that the decree must be reversed.

LORD COTTENHAM. — There should be an order retaining the bill for a year.

Mr. Boteler, being allowed to observe on the form of the order, said: Since the bill was filed two Acts of Parliament have been passed, which materially alter the situation of the plaintiff and of the defendants. Lord TENTERDEN's Act, 2 & 3 Will. 4, c. 100, is one which would enable the defendants to avail themselves of the payment of the 40*l.* a year for a certain number of years back; and there is the new Statute of Limitations, 3 & 4 Will. 4, c. 27, which would give them an advantage in the trial of the question of title; and we therefore cannot now institute an action with the same advantages or in the same situation as might have been done at the time the bill was filed. I apprehend your Lordships' intention would be to place us in the same situation in which we should have been if we had sued at law in 1830, instead of filing our bill. Therefore, in any action which should be brought for the trial of the right between the parties, your Lordships would say that the defendants, the Marquis of Waterford and his * tenants, should not be at liberty to insist * 664 on the benefit of either of those statutes; because in bringing an action now, the plaintiff would stand quite in a different situation from what he would if he had sued at law upon his legal right at the time he filed his bill.

LORD COTTENHAM. — I apprehend that makes no difference whatever in the case. If the party has mistaken his remedy, there is no reason why he should be put in a better situation now because of his having filed a bill, and asked a Court of

Equity to decide a right which should have been properly decided in a Court of Law. In many cases, where the Court wants to ascertain a fact for the purpose of enabling it to exercise its jurisdiction, that may be done ; but I never knew it adopted where the Court repudiates the jurisdiction, and leaves the party to establish his right at law ; he must establish his right at law as best he may.

THE LORD CHANCELLOR. — It is impossible to accede to this application. We grant the plaintiff an indulgence by retaining the bill ; the bill might have been dismissed altogether ; we retain the bill to save him the expense of filing a new one in case he shall have his title established at law. We do not in any other respect alter his position ; he brings his action now, subject to the alterations made in the law by the two Acts which have been referred to. We merely retain the bill for the purpose of convenience.

LORD CAMPBELL. — In this case the right to the tithes is the question to be decided at law ; therefore the party mistook his remedy by filing a bill in equity, instead of
 * 665 bringing his action ; and I do not see how, with * justice to the other side, we can place him in the situation in which he would have been if those Acts had not passed.

Mr. Boteler. — This is of the greatest importance to the plaintiff. If the principles on which your Lordships are now proceeding are carried out, the bill necessarily cannot be maintained. If we bring our action now, we can recover tithes for the last six years only : our bill was filed fifteen years ago ; therefore we shall be entitled to nothing under the action which would maintain our bill. We asked for an account from 1826 : our action, if we recover in it, would not sustain the present bill, unless we are at liberty to bring our action as at the time the bill was filed.

LORD COTTENHAM. — That makes no difference at all. The reason why a Court of Equity retains a bill, with liberty to bring an action, is to ascertain the legal right. The legal

right is ascertained as much when you go six years back as twenty years back. It does not at all fetter the administration of the equity to arise, if such a legal right be established. The Court of Equity is not to give the account founded on the legal right until it is established at law.

Mr. Boteler. — I mentioned that only as illustrating the point, that unless the proceeding is to establish the right as it was at the time the bill was filed, the House hardly gets at the point of doing justice between the parties. If we are not to establish our right as it stood when our bill was filed, on whatever ground it may happen, the bill must fail.

THE LORD CHANCELLOR. — I do not understand why, if you mistake your course, you are to have that advantage : you have mistaken the course which you *ought to * 666 have adopted. We give you an opportunity, therefore, now, of bringing your action ; you must bring your action according to the present state of the law, and not with reference to the time when you instituted a proceeding which was not the correct proceeding.

LORD COTTENHAM. — The order must be made as stated in the case of *Hughes v. Davies*. (a)

The order made was, that the decree be reversed : that the bill be retained for twelve months, with liberty to the plaintiff in the Court below to bring such action as he shall be advised touching the matters in question ; and in case he shall not proceed to trial on such action within the twelve months, then that the bill be dismissed with costs as against the appellants : and if the plaintiff shall proceed to trial within the said time, then that costs and further directions be reserved ; with liberty to any of the parties to apply to the Court below, as there shall be occasion.

(See the order more fully given, Lords' Journals for 5th September, 1844.)

(a) 5 Sim. 331; see p. 352.

1844.

WILLIAM AYSHFORD SANFORD *Appellant.*

FREDERICK EDWARD MORRICE, ARNOLD WAINE- WRIGHT and LOUISA his Wife, HERBERT LANG- HAM, LANGHAM CHRISTIE, GEORGE LAW, and the Reverend PHILIP THISTLETHWAYTE STRONG	}	<i>Respondents.</i>
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*Deed ; Shifting Clause. Will ; Appointment. Intermediate
Rents.*

T. settled his freehold estates (subject to appointment) on himself in tail, remainder to J. L. and his sons in strict settlement, remainder to L. C. for life ; provided that if J. L., or any issue male of his body, should become entitled in possession to his father's family estates, then the uses before declared of T.'s estates for the benefit of him or them who should so become entitled, and for the benefit of his or their issue male, should cease, and those estates should go over as if the person or persons so becoming entitled were dead without issue male.

J. L. having afterwards become entitled in possession to his father's family estates, T. by his will appointed his said estates to J. H. L. (the eldest son of J. L.), and his sons in strict settlement ; remainder to the heirs of H. H. deceased ; provided, that if any tenant for life in possession under the will should become entitled in possession to J. L.'s family estates, his interest in the devised estates should cease, and those estates go over to the person next in remainder under the will, as if the tenant for life were dead. The testator devised his copyhold estates upon such trusts as would nearest correspond with the uses and trusts of his freehold estates, and then gave all the residue of his real and personal estates to S. M. and W., their and each of their heirs, executors, &c., absolutely, in equal third parts.

On the testator's death in 1824, J. H. L. entered upon his estates under the will ; and in 1833, he became entitled in possession to J. L.'s family estates ; and had no son. A bill was filed by the residuary legatees, claiming the rents of all the estates accruing between 1833 and J. L.'s death or his having a son, against H. H.'s heir, who claimed the same rents, and against L. C. and H. L. (second son of J. L.), who claimed, adversely to each other, the rents of the freehold estates under the limitations in the settlement, in default of appointment of them by T.

Pleading ; Codefendants.

Held by the Lords (partly affirming a decree made on that bill), that the plaintiffs were entitled to the rents of the copyhold estate, under the residuary devise ; secondly (partly reversing the decree), that no adjudication could be made in the cause as to the rents of the freeholds, the question as to them being between the codefendants.¹

February 22, 23, 26. September 5, 1844.

THE questions in this appeal arose on the construction of shifting clauses contained in an indenture * and * 668 in a will. (a) By the indenture, dated the 13th of April, 1804, and by a fine and common recovery levied and suffered in pursuance thereof, the Rev. Francis Tutte conveyed certain freehold manors, together with divers farms and other hereditaments, to such uses as he should afterwards, by deed or will, appoint ; and, in default of appointment, to the use of himself in tail, with the remainder to the use of James Langham, Esq., the second son of Sir James Langham, of Cottesbrooke Hall, in the county of Northampton, deceased, for his life ; with remainder to the use of trustees during the life of the said James Langham, to preserve contingent remainders ; with remainder to the use of his first and other sons successively in tail male ; with remainder to the use of the respondent, Langham Christie, for his life, with a limitation to trustees to preserve, &c. ; with remainder to the use of his first and other sons successively in tail male ; with remainders over, and the ultimate remainder to the use of the right heirs of Herbert Hay, deceased.

The indenture contained the following clause : “ Provided always, and it is hereby agreed and declared by, &c., that in case the said James Langham, or any issue male of his body, shall become entitled to the possession or to the receipts of the rents and profits of the family estates late of the said Sir James Langham, deceased, to the amount of 1000*l.* per

(a) 11 Simons, 260 ; and 8 Meeson & Welsby, 194.

¹ As a general rule the Court will not make a decree between codefendants ; but this rule is not invariable. See 1 Dan. Ch. Pr. (4th Am. ed.) 842, note (3) ; 2 *ib.* 1370.

annum over and above all outgoings and reprises, then and in every such case, the use, limitation, and estate, uses, limitations, and estates herein before limited, expressed, declared, and contained of and concerning the said hereditaments and premises, to or for the benefit of him or
 * 669 them who shall so become * entitled to the possession or to the receipt of the rents and profits of the family estates of the said Sir James Langham, or any of them, to the amount of 1000*l.* per annum as aforesaid, and to or for the benefit of the issue male of such person or persons so becoming entitled, shall cease, determine, and be absolutely null and void; and then and in every such case all and singular the said hereditaments and premises shall immediately thereupon from time to time divest out of the person or persons so becoming entitled, and shall go over in such and the same manner, to all intents and purposes, as if such person or persons so becoming entitled were actually dead without issue male."

In 1812 the said James Langham became Sir James Langham, and entered into the possession and the receipt of the rents and profits of the family estates mentioned in the indenture, to the amount of 1000*l.* a year and upwards.

In 1820 the said F. Tutte made his will, and thereby, in pursuance of the power reserved to him by the above-stated indenture, he appointed all the said manors and other hereditaments (subject to an annuity to the respondent, Mrs. Wainewright, which he afterwards revoked by a codicil) to the use of Alexander Hale Strong, since deceased, and the respondents F. E. Morrice and A. Wainewright, their heirs and assigns, upon certain trusts for raising the sum of 12,000*l.* (for which 10,000*l.* was afterwards substituted by a codicil), to be considered as part of the testator's personal estate; and, subject thereto, he thereby directed and appointed that the said Strong, Morrice, and Wainewright, and the survivor of them, and the heirs and assigns of such survivor, should stand seised of all the said manors and other hereditaments, *
 * 670 to the use of James Hay Langham, the eldest son of Sir James Langham, of, &c. (this Sir James being the same person who in the indenture was mentioned

as James Langham, Esq.), and his assigns for his life ; with remainder to the use of John Lupton and Willoughby Rackham and their heirs, during the life of the said J. Hay Langham, upon trust, to preserve the contingent uses and estates therein after limited ; with remainder to the use of the first and other sons of the said J. Hay Langham successively in tail male ; and in default of such issue, to the use of the right heirs of Herbert Hay, deceased, for ever : “ Provided always, &c., that each person who, by virtue of any of the uses, limitations, and provisions herein contained, shall for the time being be tenant for life in possession of the said manors, hereditaments, and premises, or of any part thereof, and shall at the same time become entitled to the settled estates of Sir J. Langham, of, &c., so as to be in the actual receipt of the rents thereof, then and in every such case, and thenceforth, the estates and interests herein before limited to every tenant for life respectively, of and in the said manors, hereditaments, and premises hereby limited, as shall become so entitled in possession to the said settled estates of the said Sir J. Langham, shall cease and determine : Provided also, &c., that every person who, according to the uses, limitations, or provisions herein contained, shall for the time being be tenant in tail in possession of the said manors, hereditaments, and premises herein before limited, and shall at the same time become entitled to the said settled estates of the said Sir J. Langham, so as to be in the actual possession or in the actual receipt of the rents and * profits thereof ; then * 671 and in every such case, and thenceforth, the estate tail which every such person shall by virtue of any of the trusts, limitations, or provisions be seised of or entitled to in the said manors, hereditaments, and premises hereby limited, shall cease and determine : and in either of the cases last mentioned, the said manors, messuages, lands, tenements, hereditaments, and premises hereby directed, limited, and appointed as aforesaid, shall immediately thereupon go over to the person next in remainder under the limitations aforesaid, in the same manner as the said person so next in remainder would take the same, by virtue of this my will, if the person so becoming entitled to the said settled estates of the said Sir J. Langham,

being tenant for life, was dead, or being tenant in tail, was dead without issue male."

The testator by his said will devised his copyhold and customary estates to the said A. H. Strong, his heirs and assigns, upon such trusts, and with, under, and subject to such powers, provisos, and limitations, and to and for such intents and purposes, as would nearest and best correspond with the uses and trusts therein before limited of and concerning his manors and freehold hereditaments therein before directed, appointed, and limited. He then gave some directions respecting books, pictures, and fixtures. And as to all the rest and residue of his real and personal estates, of every nature and kind whatsoever, he gave, devised, and bequeathed the same to the said Strong, Morrice, and Wainwright, and their and each of their heirs, executors, administrators, or assigns, in equal third parts, according to the nature and quality of the same estates respectively; and he appointed them his executors.

* 672 * The testator made several codicils to his will, not affecting the matters in question in this appeal, and he died without issue in January, 1824; whereupon James Hay Langham, the first tenant for life named in the will, entered into possession or receipt of the rents and profits of the freehold and copyhold estates thereby devised. Alexander Hale Strong, one of the trustees and executors, died in the same year.

In April, 1833, Sir James Langham in the will mentioned (and in the indenture of April, 1804, mentioned as James Langham, Esq.), died, leaving several sons, the eldest of whom, the said James Hay Langham, succeeding to the baronetcy, became entitled to and entered into the possession or receipt of the rents and profits of "the settled estates" in the will mentioned (the same as the family estates mentioned in the indenture), exceeding 1000*l.* per annum.

Upon that event, and inasmuch as Sir James Hay Langham had no male issue, several parties, insisting that the life-estate limited to him by the will had then ceased by virtue of the proviso therein contained, claimed to be entitled

to the rents and profits of the devised estates during his life or until he should have a son. All such rents and profits were claimed during that period; 1st, by the respondents, Morrice, Wainewright, and his wife, and Law and P. T. Strong (who are the representatives of A. H. Strong, deceased), by virtue of the residuary bequest in the will; 2dly, by the appellant (then an infant), under the ultimate limitation in the will to the right heirs of Herbert Hay, the appellant being one of his heirs, if not his sole heir; 3dly, the respondent Langham Christie claimed to be entitled to the rents and profits of the freehold estates only during the same period on the ground * that, being undis- * 673 posed of by the will, they belonged to him in the events that happened, under the limitations and proviso contained in the indenture of 1804, in default of any appointment by F. Tutte in exercise of the power therein reserved to him; and 4thly, the respondent Herbert Langham, who is the second son of James Langham mentioned in the indenture, claimed the last mentioned rents during the same period, on the ground that the only uses and estates that ceased by virtue of the proviso contained in the indenture were the life-estate of the said J. Langham, and the estate tail of his eldest son J. Hay Langham; and that this respondent, as the person next in remainder, was the person who would have been entitled to the said freehold hereditaments under the limitations of the indenture, in default of appointment by F. Tutte.

Sir J. Hay Langham having continued in possession or in receipt of the rents and profits of the devised estates notwithstanding his succession to the settled estates of Sir J. Langham, the three first-named respondents filed their bill in Chancery in 1836 (afterwards amended) against him and all the other respondents, and against the appellant and others. (a)

After various proceedings in the cause, the Vice-Chancellor made a decree on the 16th November, 1840, by which he declared, among other things, that, according to the true con-

(a) See the allegations and prayer of the bill, 11 Sim. 265 *et seq.*

struction of the testator's will, the rents and profits of his copyhold estates, as from the 14th of April, 1833, the time when Sir J. Hay Langham became entitled to the settled estates of Sir J. Langham, so as to be in the actual receipt of the rents thereof, to the time of the decease of the said

* 674 * Sir J. Hay Langham, or until he should have male issue, passed by the residuary devise in the will to A. H. Strong, F. E. Morrice, and Arnold Wainewright, in equal third parts, in manner and according to the directions and trusts of the will. And his Honor declared, that the rents and profits of the freehold estates in question, accrued and to accrue during the same period or any part thereof, were not disposed of by the said will, and that the same belonged to the person or persons who would have been entitled to such estates under the indenture of the 12th of April, 1804, in default of any appointment by F. Tutte in exercise of the power therein contained. And the decree, after directing the Master to take certain accounts and make inquiries therein specified, which are not material to be here stated, ordered that a case be made for the opinions of the Barons of the Court of Exchequer; and that the questions in such case should be, whether under the limitations and proviso contained in the said indenture, supposing no appointment to have been made by F. Tutte in exercise of the power therein contained, the defendant Herbert Langham was entitled to any and what estate in the freehold hereditaments comprised in the indenture; and whether the defendant Langham Christie was entitled to any and what estate in the said freehold hereditaments. And the decree reserved all further directions until after the said barons should have made their certificate. (a)

The appeal was brought against so much of the decree as is above stated.

* 675 * *Mr. James Russell* and *Mr. Hodgson*, for the appellant. — There is no dispute as to the facts of this case. The freehold estates comprised in the deed are the same that

(a) The Barons certified that Herbert Langham was not entitled to any estate in the hereditaments, but that Langham Christie was entitled to an estate for life in them. 8 Mee. & Wels. 194.

are appointed by the will. By the deed those estates, in default of issue of Mr. Tutte and of appointment by him, stood limited to the second son of James Langham for life, and to his issue in tail male. That son becoming Sir James Langham, also became entitled to the settled estates of Cottesbrooke in the lifetime of Mr. Tutte, who then, in exercise of the power by the deed reserved to him, by his will appointed the freehold estates to the use of James Hay Langham for life, and to his first and other sons in tail male, in strict settlement; and in default of such issue, to the right heirs of Herbert Hay. The appellant is his sole heir; and consequently, by virtue of this limitation, and of the proviso in the will for *cesser* of J. H. Langham's life-estate, in the event which happened in 1833, the rents of these estates, thenceforward during his life or until he shall have a son, belong to the appellant, as the person next in remainder under the limitations. That part of the will is clearly an appointment in exercise of the power reserved in the deed. Then follows a devise of the copyhold and other estates not comprised in the deed, upon such trusts and under such limitations as would nearest correspond with the trusts by the will appointed of the freeholds. To these, therefore, the appellant is entitled, as well as to the rents of the freeholds during the same period.

The case is somewhat new; at least there is no authority for the decision of the Vice-Chancellor, which proceeds on the principle, that in the events that happened, there is no disposition of the rents of the freeholds until the remainder actually takes * effect, but that they are to go * 676 in that interval according to the limitations of the deed. (a) If Mr. Tutte had not exercised the power of appointment reserved to him in the deed, the freehold estates would, upon the accession of James Langham to the settled estates of his family, have gone, under the limitations of the deed and the proviso therein, to Herbert Langham, or to Langham Christie, with whose conflicting claims the appellant does not concern himself; his object being to establish his own exclusive right under the limitations of the will, in

(a) 11 Sim. 278, 279.

the event which has happened, to the rents and profits of all the estates during the life of Sir James Hay Langham or until he shall have issue male.

The legal estate in the freeholds, from the time of the accession of Sir J. H. Langham to the Cottesbrooke or settled estates in 1833, being upon the construction of the will vested in trustees either for his life or in fee, the gift or appointment of those estates "to the person next in remainder under the limitations of the will, in the same manner as the said person so next in remainder would take the same if Sir J. H. Langham were dead," must be understood to apply to and be a gift of the equitable title to the rents and profits only. *Doe dem. Heneage v. Heneage*, (a) *Carr v. Lord Errol*, (b) *Stanley v. Stanley*. (c)

The gift is not to the person who will be entitled after the death of Sir J. H. Langham (which would be uncertain), but to the person next in remainder, who would take by virtue of the will if Sir J. H. Langham was now dead; which description is properly answered by the appellant.

* 677 * The devise or appointment, considered on those grounds, was the gift in equity of a separated portion of the rents and profits, not by way of acceleration to a person who might be entitled to claim them at a future time, but as a separate and arbitrary gift; and, consequently, the only question to be determined is, to what person the expression used in the will properly applies; and the case, therefore, does not fall within the learning either of contingent remainders or of executory devises.

It does not follow that, if the appellant be let in to take this separated portion of the equitable estate, the contingent remainder would be thereby precluded from afterwards becoming vested by the birth of a son at any time during Sir J. H. Langham's life; for it would not be the entry of a subsequent remainder-man in right of that remainder, but the taking by a remainder-man, by way of express devise and independently of his title as remainder-man, of a portion of

(a) 4 T. R. 13.

(b) 6 East, 58.

(c) 16 Ves. 491.

interest which, if not so given, would result, and which would be determined by the same event which vested the contingent remainder; namely, the birth of a son to Sir J. H. Langham.

The law, if it gives any favour, in cases such as this, to the heir at law, gives it only to the heir as such; and therefore the case of Langham Christie, claiming the freeholds under the deed of 1804, on the ground of failure of appointment; the case of the residuary devisees, claiming the copyholds under the residuary devise; and the case of the appellant, claiming the rents of both under the alleged construction of the will, are entitled to equal favour.

In the argument in the Court below, and in the Vice-Chancellor's judgment, it was said that *Hopkins* *v. * 678 *Hopkins*, (a) and cases of that class, are opposed to the appellant's claim; but on examination of these cases, it will be found that, if they apply at all to this case, they are more in favour of the appellant than of the other parties. The reason for appealing at once to this House from the Vice-Chancellor was, that as there is no authority for his Honor's decision but the *dictum* of Sir W. GRANT in *Stanley v. Stanley*, (b) that *dictum*, if found to be against the appellant, might be reversed; but it is submitted that neither that case nor *Carr v. Lord Errol*, (c) on which also the Vice-Chancellor relied, sustains his decree.

Mr. Wigram, for the respondent, Langham Christie, submitted that this respondent was, in the events which happened, entitled, under the limitations of the deed, to the rents of the freehold estates not appointed by the will: that the estate thereby limited to the right heirs of Herbert Hay was limited to take effect after the estates limited to the first and other sons of J. H. Langham in tail male, and could not take effect in possession until after his death and failure of his issue male: that the appellant, claiming as heir of Herbert Hay, could not by law be entitled to the rents and profits of

(a) 1 Atk. 581; 1 Ves. Sen. 268; Forr. Cas. temp. Talbot, 44; and see also Butler's note to Co. Litt. 271 b; and Hargrave on the Thellusson Act, page 48.

(b) 16 Ves. 511.

(c) 6 East, 58.

the devised freehold and copyhold hereditaments accruing before the estate limited to the right heirs of Herbert Hay had taken effect in possession: that the effect of the proviso was not to create any new limitations, but, by removing the life-estate of J. H. Langham, to let in the other limitations; but that acceleration was the true operation of

* 679 * the proviso, neither complicating the construction by raising springing uses, nor carrying the estate beyond the next taker. *Doe dem. Lumley v. Scarborough*, (a) *Nichols v. Sheffield*, (b) *Hopkins v. Hopkins*, (c) *Bullock v. Stone*, (d) *Stanley v. Stanley*, (e) *Doe d. Heneage v. Heneage*, (g) *Fearne Cont. Rem.*, (h) *Carrick v. Errington*, (i) *Wills v. Wills*. (k)

LORD COTTENHAM directed the attention of counsel to the form of the pleadings. The principal question in the appeal is between codefendants in the Court below; and the ordinary course there would be, when the plaintiffs failed in making out a title to the rents of the freehold estates, to dismiss their bill *quoad* those estates.

LORD BROUGHAM. — The plaintiffs were out of Court by the declaration of the Vice-Chancellor as to the freehold estates; (l) and if the House should affirm his decree as to them it would be affirming a decree between codefendants.

Mr. Bethell, for the respondent Morrice and the other residuary legatees (plaintiffs below), said the decree declared them entitled to the rents of the copyhold estates under the residuary devise in the will.

LORD COTTENHAM. — The decree may be right as to the copyholds, nor do I say the declaration as to the freeholds is wrong; but is there any case stated on the pleadings to

(a) 3 Ad. & El. 21, 897.

(b) 2 Bro. C. C. 215.

(c) Atk. 581; and Butler's note to Co. Litt. 271 b.

(d) 2 Ves. Sen. 521.

(e) 16 Ves. 491.

(g) 4 T. R. 13.

(h) Page 620, App. (9th ed.).

(i) 2 P. Wms. 361.

(k) 1 Dru. & War. 439.

(l) *Supra*, p. 674.

justify the Court in making a declaration as to the freehold rents? The suit, as it * appears to me, went * 680 on between codefendants on a point in which the plaintiffs had no interest under the decree. The better course is for counsel to examine the pleadings, to see if they are in a state to bring properly before the House the question of title to those rents.

Mr. Bethell, after submitting that the decree was complete enough for their Lordships' adjudication, proceeded to support it, confining his argument to the claim of his clients to the rents of the copyhold estates. According to the will, the ultimate limitation to the heirs of Herbert Hay is not to take effect until the death of J. H. Langham (still living), and the failure of his issue male; and cannot, therefore, include any interest in the rents of the property in question accruing during the life of J. H. Langham. The testator not having, in the events which have happened, in any manner disposed of the rents and profits of the copyhold estates accrued and to accrue during the period (viz., from the time when J. H. Langham became entitled to the settled estates of Cottesbrooke Hall, so as to be in the actual receipt of the rents of them to the time of his decease, or until he shall have issue male), except by the residuary clause contained in the will, the same are included in the devise of the residue of the testator's real estates contained in his will. The testator not having at the date of his will or afterwards any freehold estate, save that which was subject to his power of appointment and of which he was, subject to such power, tenant in tail, and not having in any manner disposed of the rents and profits of the said freehold estates accrued and to accrue during the said period, and the Court below having by its decree declared that the rents and profits of the * freehold estates accrued and to accrue during the * 681 same period or any part thereof were not disposed of by the will, there would be no property whatever to answer the residuary devise of the testator's real estates, unless the rents and profits of the copyhold estates during such period did pass thereby.

No counsel appeared for Herbert Langham. (a)

Mr. Hodgson, in reply to the arguments of *Mr. Wigram* and *Mr. Bethell*, submitted that they did not shake or at all weaken the case of the appellant. The true construction of the limitation and provision in the will is to give the appellant the rents of the freeholds, at all events. It is always to be taken as certain that a testator never intends his heir at law to take under his will; he takes against the will, as Langham Christie claims to do here. It is not necessary to contend that if those rents were undisposed of by the will, the heir of the testator would not take; but our argument is, that they are given to the appellant under the *cesser* in the proviso of the will, he being the person who now answers the description of the person next in remainder.

September 5.

LORD COTTENHAM. — The difficulty which I suggested during the hearing of this case at the bar has not received, in my opinion, any satisfactory answer. It was this: that the issue with regard to the freeholds arose entirely between codefendants; and that if so, it was not only not the habit of a Court of Equity, but was not consistent with its principles, to adjudicate between codefendants. But as to the copyholds, that was not the case, because there had
 * 682 been an * adjudication as regards the plaintiffs' interest, so far as they claimed any interest in the copyholds. Now the judgment of the Vice-Chancellor was quite correct as to the copyholds, in my opinion; and I believe that is the opinion of the noble and learned Lords who with me attended the argument. So far, therefore, as relates to the copyholds, I should advise your Lordships to affirm the judgment of the Court below. But inasmuch as we are of opinion that, as regards the freeholds, the Court below proceeded erroneously in adjudicating between codefendants, the proper course to be adopted would be to reverse the decree so far as relates to the freeholds, not upon the merits,

(a) See the arguments for him and Langham Christie, 8 M. & W. 198.
 [574]

but because the question, as it is stated in the decree, arose between codefendants; and then it may be necessary to make a reservation, in order to enable the defendants to set themselves right in the form of the suit; because in that view of the case, the bill ought to have been dismissed at the hearing, *quoad* the freeholds; and if the parties think it worth while to come here again for the purpose of having the decree set right in that respect, they possibly may be entitled to do so.

The order I should propose would be, to affirm the decree so far as it relates to the copyhold property, and to reverse it so far as it relates to the freehold, upon the ground of its being a question between codefendants; with liberty to the parties to present another appeal upon any question arising between them and the plaintiffs *quoad* the freeholds. If the counsel have any thing to suggest against that order, I shall be glad to hear it now, not on the merits, but on the form.

Mr. Sidebottom, for the plaintiffs below, said, as the * appeal was now held to be wrong as against them, * 683 they ought to have their costs.

LORD COTTENHAM. — The plaintiffs have no interest in the appeal, except as to the copyholds; and in that respect the decree is affirmed, though reversed in respect to the freeholds: I see no reason why they should not have their costs, because they are brought here merely to protect their own interests.

Mr. Hodgson reminded their Lordships that the bill was filed originally by the trustees, calling upon the Court to put them in execution of the trusts.

The following order was made, viz. : —

It was ordered, that the said decree, so far as it related to the rents and profits of the copyhold estates in question, be affirmed: and it was further ordered that the said decree, so far as it related to the rents and profits of the freehold es-

tates in question, and to the directions touching them, be reversed, on the ground of the same being upon matters in question between codefendants in the Court below: and it was further ordered that the appellant do pay to the plaintiffs in the Court below, and to the said respondents Geo. Law and P. T. Strong, their costs of the appeal, so far as it related to the copyhold estates: and it was also further ordered that the appellant or respondent Langham Christie be at liberty to present another appeal upon any question arising between them respectively and the said complainants, as to the said freehold estates.

1844.

ROBERT FLOYD WATERS *Appellant.*
 RICHARD GROOM and Others, Assignees of } *Respondents.*
 ABRAHAM HENRY CHAMBERS, a Bankrupt }

Trustee. Sale. Specific Performance.

W. being indebted to C., agreed by deed to convey his estate to C., upon trust to sell the same, and to pay off certain debts of W. due to other persons, and then the debt due from W. to C., and to pay over the surplus, if any, to W. No conveyance was executed. C. being afterwards in possession of the estate under a *fi. fa.* issued on a judgment upon a warrant of attorney given by W., agreed with W.'s agent to purchase the estate. W. ratified the contract, but subsequently impeached it as one made by a trustee for his own benefit and against the interest of the *cestui que trust*.

Held, that C. was not a trustee for W., but was a creditor holding a security for his debt; and that the contract of sale was valid.¹

¹ See *Knight v. Marjoribanks*, 2 Mac. & G. (Am. ed.) 10 and note (1) and cases cited; *Hendricks v. Robinson*, 2 John. Ch. 283, 311; *Webb v. Rorke*, 2 Sch. & Lef. 673; 1 Ball & Beat. 164; *Ex parte Marsh*, 1 Madd. 148; *Chambers v. Waters*, 3 Sim. 42; *Iddings v. Bruen*, 4 Sandf. Ch.

Practice.

Quære, whether an appeal will lie against a decree for mere matter of form.

Costs.

Semble, that on an appeal for such a cause, the House might affirm the decree in all other respects, but vary it on the point of form, and make the appellant pay the costs.

February 12, 16, 19, 22; September 5, 1844.

ON the 26th of February, 1823, A. H. Chambers, who afterwards became a bankrupt and is now represented by the respondent, filed his bill against Edmund Waters (now represented by the appellant), to compel the specific performance of an agreement made on the 25th of August, 1821, for the sale by Waters to Chambers of the Italian Opera House. The bill stated the following circumstances: Waters had on the 17th September, 1816, become the proprietor of the Opera House, in virtue of a sale made under an order of the Court of Chancery in a cause of *Waters v. Taylor*; (a) he had purchased the property for a sum of 70,150*l.* By the conditions of the sale, the purchaser was to pay * a de- * 685 posit calculated at the rate of 10 per cent upon the purchase-money. Being unable of himself to pay this deposit, Waters had, in anticipation of becoming the purchaser, applied to Joshua Mayhew, of Chancery Lane, solicitor, to procure for him acceptances to the amount of 6000*l.* from Messrs. Birch & Chambers, at that time carrying on business as bankers in Bond Street. These acceptances were procured, Waters and Mayhew giving to Messrs. Birch & Chambers a joint and several promissory note for the sum thus advanced. Waters, at the same time, executed an indenture, dated on

(a) 15 Ves. 10; 2 Ves. & B. 298; see, also, 1 My. & C. 266.

223; *Murdock's Case*, 2 Bland, 461; *Parkinson v. Hanbury*, 2 De G., J. & S. 450; *Kirkwood v. Thompson*, 2 De G., J. & S. 613; *Shaw v. Bunny*, 2 De G., J. & S. (Am. ed.) 468 and note (1). But if, from the influence of his position, a mortgagee purchases from a mortgagor at an under-value, the sale may be set aside. *Ford v. Holden*, L. R. 8 Eq. 461.

the 16th September, 1816, by which he stipulated to indemnify Mayhew against any liability on this note. By an indenture of the 5th October, 1816, between Waters, Birch, Chambers, and Mayhew, Waters, in consideration of what was then due from him to Birch & Chambers, and of a further advance by them to him of 8000*l.*, appointed that the deed of 16th September, 1816, should, subject to Mayhew's charge, be a security to Birch & Chambers for all moneys due or to become due from him to them, and Mayhew was to stand possessed of the premises in trust for them. On the 25th August, 1817, pursuant to an order made in the cause of *Waters v. Taylor*, a sum of 28,000*l.* was paid into Court in further discharge of the purchase-money of the Opera House. This sum was advanced by Birch & Chambers to Waters; and by an indenture of that date, to which Waters, Birch & Chambers, and Mayhew were all parties, — after reciting the previous transactions, and also the fact that in 1813 Waters had granted an annuity of 1200*l.* to the Eagle Insurance Company, not secured upon the Opera House, but upon certain freehold and leasehold premises of Waters, redeemable on

* 686 the payment of 12,000*l.*, — it was agreed that the * promissory note to which Mayhew was a party should be given up to be cancelled; and that the premises comprised in the indenture of 1813 should be assigned by Waters to Birch & Chambers, in trust to sell and apply the proceeds in repurchase of the annuity, and then in reduction of the several sums (with interest) of 6000*l.*, 3000*l.*, and 28,000*l.*, which had been advanced by Birch & Chambers to Waters; and on further trust, after payment of Mayhew's claims, to pay over the surplus, if any, to Waters, his executors and assigns; and it was further agreed (with the consent of Mayhew) that Waters should assign the Opera House to Birch & Chambers, as security for the money due or to become due from him to them. This indenture contained a power of sale, and the usual covenants, for the purpose of enabling Birch & Chambers, if necessary, to carry into effect the powers thus conferred on them; but these powers were not to be exercised except after three months' notice to Waters. On the same day, and as a collat-

eral security, Waters executed a warrant of attorney for the sum of 80,000*l.*, on which judgment was shortly afterwards entered up.

A person named John Mills, of the firm of Mills, Robinson, & Young, attorneys, had been before concerned for Waters, and had claims upon him; and on the 20th July, 1819, an indenture was executed, to which Waters, Birch & Chambers, Mayhew, Mills, and Mills, Robinson, & Young, were severally parties. This indenture, after reciting the previous deeds and transactions, witnessed that Waters, Birch & Chambers, and Mayhew, released to Mills all their charges and incumbrances upon the Opera House, to hold till payment, with interest, of the debts due to Mills, and to him and his partners, in trust, in case Waters, or any one * on his behalf, should pay such debts to Mills, and to * 687 Mills, Robinson, & Young, the same was to be reassigned to Waters. By a memorandum of the 25th March, 1820, indorsed on the indenture of 25th August, 1817, it was declared that the whole of Waters's freehold, copyhold, and leasehold property in Middlesex and Surrey should be deemed to be included in that indenture. On the 18th July, 1820, a *fi. fa.* was issued on the judgment on the warrant of attorney given on the 25th August, 1817. Mr. Birch died on the 24th May, 1821. Mr. Chambers afterwards made other advances to Waters to a large amount; and on the 16th of August, 1821, Mayhew and Chambers obtained an order in the cause of *Waters v. Taylor*, that certain funds in the Court in that cause should not be paid over to Waters without notice to them.

On the 25th August, 1821 (Chambers being then in possession under the *fi. fa.*), in consequence of a proposition made, as Chambers alleged, to him by Waters through Mills as his (Waters's) solicitor, Chambers agreed to become the purchaser of the Opera House, and the agreement now in dispute was entered into. This agreement was made between Mills, on behalf of Waters, of the one part, and Chambers of the other part. It recited Waters's title to the Opera House, and his authority to Mills to sell the same, and declared that Mills had agreed with Chambers for the sale thereof to him,

upon the terms therein after expressed. The purchase-money was fixed at the sum of 80,000*l*. The sale was to be subject to the covenants in the leases of the theatre, and also subject to the interest of the lessees of the several boxes in such indenture expressly mentioned. Mills, in behalf of

Waters, who was then resident in France, entered into
 * 688 the usual covenants as to title, the making out of * which was to be completed before the 31st August, 1823; and also covenanted to obtain renewals from time to time of the leases under which the property was held. Upon the execution of the assignment, Chambers was to account for the 80,000*l*., with interest at five per cent, and to be at liberty to deduct thereout the moneys due to him as mortgagee of the premises; he was to pay the rents from the 29th September, 1820, and the premiums on the policies of assurance, and perform the covenants in the leases, and thereupon to be entitled to the profits from that date; and if, between the date of the agreement and its final confirmation or relinquishment, the premises should suffer a loss by fire greater than was covered by the policies, the agreement was to be at an end. It was further agreed that Chambers was to be let into possession as purchaser, on the execution of the agreement; and that in case Waters should not be able to make an assignment of the theatre on or before the 31st August, 1823, or to obtain renewals of the leases, Chambers, in consideration of holding possession of the premises, was to pay interest at the rate of five per cent on the 80,000*l*. for such time as he held the same. It was also specially provided that in case Waters should not confirm the contract within two months from the date thereof, it was to be void, and Chambers was to be treated as tenant for one year. Upon the execution of this agreement, Chambers, with the consent of Mills, took on himself the whole management of the theatre. On the 10th September, 1821, Waters by deed-poll confirmed the agreement.

The original bill filed against Waters, Mills, and Taylor, charged, among other things, that Mills, as the duly authorized agent of Waters, had, by a deed executed by his
 * 689 own proper hand and attested * by his son, and de-

livered to Chambers by Mills, entered into the contract; that Waters was in this country when he executed the deed of confirmation; that Mills, not expecting him here, had previously sent an engrossment of the deed-poll to France, for his execution there; that on Waters learning this fact, he had desired another engrossment to be made, in order that no time might be lost in settling the transaction; that this was accordingly done, and the deed was executed as before mentioned, and was accompanied by a note from Waters to Chambers, expressed in the following terms: "In affixing my name to the instrument which accompanies this, and authorizes Mr. Mills to complete the sale of the Opera House to you, allow me to express a hope that nothing will occur during the period you may hold it, that shall in the remotest degree cause you to lament the engagement you have entered into; but, on the contrary, that it may be productive of advantages not even contemplated by you at the present moment. In making this brief acknowledgment of what I feel the occasion demands, I take the opportunity of assuring you that no occasion of my life has been productive of so much regret as the difference which took place between us before I left London, — fomented, I fear, in a good measure by those who might have exercised a most friendly interference."

The bill further charged that William Leake had in April, 1822, become the attorney of Waters, and as such wrote a letter to Chambers in the following words on the 22d of that month: "Having received from Mr. Edmund Waters full powers for the purpose of enabling me to undertake the future conduct and management of his affairs in this kingdom, * I have to request that you will furnish me * 690 forthwith with a statement in writing of all pecuniary dealings and transactions which have taken place between you and him, up to the present period, in order that measures may be immediately adopted for adjusting any balance which may appear due thereon; and I beg leave, at the same time, to acquaint you that I shall be perfectly ready to render any assistance in my power, consistent with Mr. Waters's interest, towards carrying into effect, with as little delay as the circumstances of the case will admit of, the contract which had

been entered into with you by Mr. Mills, on his behalf, for the sale of the Opera House, regard being had to the points which I understand still remain in dispute between Mr. Waters and Mr. Taylor."

Waters put in his answer to this bill, and, admitting the facts as to the loans of money, and the execution of the various deeds, insisted that Mayhew was not his agent, but acted for himself, or on behalf of Birch & Chambers; that the deed of 25 August, 1817, was executed by him without the same being fully read over or explained to him, and that he was, in fact, misled as to its contents, and it was only executed by him because of the threat of Chambers to withhold the advance of the 28,000*l.*, which money it was absolutely necessary for him, Waters, to obtain; but Waters submitted that, under the terms of that deed, Chambers became a trustee for him, Waters, and was not entitled to enforce a sale made by himself (Chambers) to Waters's disadvantage.

The answer went on to allege that in 1818, in consequence of the interruption of the performances at the theatre, the public became dissatisfied, and a committee of noble-
* 691 men and gentlemen was formed * for the purpose of purchasing the theatre, when Chambers furnished Waters with a calculation of the sum at which alone Waters ought to sell the theatre, and that this calculation fixed the purchase-money at 101,000*l.*; that Chambers induced him to demand that sum from Mr. Wilkins, the agent of the committee, and that in consequence of his so doing the negotiation was broken off, though, as he believed, the committee would have purchased the theatre at the sum of 90,000*l.*, which sum Chambers would not allow him, Waters, to accept. The answer alleged that Waters, by reason of his embarrassment, was entirely in the power of Chambers; that advantage was taken of that circumstance, and that securities were from time to time brought to him to execute when he was otherwise engaged, and that he was never made acquainted with the contents of the documents which were given him to sign. Waters denied that he, or any person on his behalf, made any proposals to Chambers to purchase the Opera House; he declared that, on the contrary, after the

failure of the negotiation with the committee, he never intended to sell the same to Chambers or any other person under the sum of 100,000*l.*; that he was much surprised when in or about October, 1821, and long after the articles had been signed, he received the first intimation from Mills that he had entered into a contract with Chambers for the sale of the Opera House for 80,000*l.*, and he remonstrated with Mills thereupon; that he never authorized nor intended to authorize Mills to enter into any contract of the kind; that the consideration was wholly inadequate, for that, since the original purchase, he (Waters) had spent above 7000*l.* in the improvement of the theatre; and that the property was daily becoming more valuable, as all incumbrances

* upon the theatre, except one annuity of 250*l.*, would * 692
cease in the year 1825. The answer further alleged that Mills represented to Waters that the agreement was merely a conditional agreement, and would be determined at the time limited therein, namely, on the 31st August, 1823, in case the property should not be sold; for that the agreement was executed to Chambers merely for the purpose of enabling him to sell the property at its real value on Waters's behalf, inasmuch as it would be impossible in any other manner to sell the same, in consequence of the un-terminated litigation between Waters and Taylor; that Mills further stated that Chambers would not on other terms withdraw the execution which he had issued, and that Waters could not in any other way relieve himself from his embarrassments: that under such circumstances it was that he (Waters) consented to the execution of the contract; and he submitted that Chambers must be treated as trustee for him, and had violated his duty as a trustee in not disposing of the property at a better price, and that Mills had acted altogether under the influence of Chambers, and without regard to his duty as solicitor to him (Waters), and that, therefore, the agreement ought not to be enforced.

The cause was heard before the Vice-Chancellor, who, on the 21st May, 1829, (a) made a decree for specific perform-

(a) 3 Sim. 42.

ance; which decree was, by an order of the Lord Chancellor, (a) made on the 6th July, 1833, fully confirmed.

Some of the parties having died, and new assignees having been appointed in Chambers's bankruptcy, bills of revivor and supplement were filed; and on the 6th November, * 693 1840, the Vice-Chancellor made a supplemental decree for carrying the former decrees into effect.

This was an appeal against all these decrees.

Mr. Russell and *Mr. Winstanley*, for the appellant. — There was either no contract between Chambers and Waters, or such a contract as a Court of Equity cannot enforce. In the case of *Roberts v. Boson*, (b) a man of the name of Rowe had assigned an equitable interest in certain wines to Boson, on trust to sell in default of payment of certain money; and the deed contained a clause that the mere production of the indenture by the party to whom the money was due should be proof of default made in payment of the same, and that whatever the trustees did should be sufficient to save the purchaser. On a sale being about to take place under this power, an application was made for an injunction to restrain the party from selling, and Lord ELDON said that the deed stipulated that if R. should make default in the payment of a certain ascertained sum in a specific time, of which the production of these presents shall be evidence, there may be a sale; that such a clause was not usual when he was at the bar, and that he did not think it could be right for a creditor thus to be made trustee for himself; and he granted the injunction. That case was stronger than the present, for what is here done by the effect of the deed was there done by its express provisions, and yet a sale by such a person was held invalid. It was clearly Lord ELDON's opinion that in such a case the Court of Equity would deal with a creditor as the trustee for the debtor, and would look upon * 694 his acts with peculiar suspicion. There is no * distinction between a covenant to assign an equitable

(a) 1 Coop. Select Cases, temp. Lord Brougham, 91.

(b) Not reported, but cited from MS.

interest, and an actual assignment of it ; but this deed makes such a distinction, for it provides expressly that from the moment of its execution, all the trusts and powers thereby created shall be the same as if there had been an actual execution of an assignment itself. Here the party has meddled with the trusts, and has, therefore, made himself liable to the responsibilities of a trustee.

[THE LORD CHANCELLOR. — The substance of your argument is, that this was a sale by Waters to Chambers, and that Chambers could not purchase from Waters on account of the character with which he had clothed himself by the deed. If this was a fair transaction, you admit that it would be a valid one.]

Certainly. But it is invalid, because under the circumstances it is and must be deemed to be unfair. Then, again, here was Mills, the solicitor to Waters, binding his client, who had not a shilling in the world and was an outlaw, to pay sums of money which it was impossible he could pay, and yet the most serious consequences were to follow from his not doing so. This was a great breach of duty on the part of the solicitor, and the whole agreement appears to be one made by the solicitor of a party with the trustee of that party, and yet to be one destructive of that party's interests. Such an agreement cannot be sustained. The supposed act of confirmation may easily be explained : it was obtained in such a manner as not to entitle the respondent to use it so as to defeat the appellant's rights. Waters had come over to England secretly : while he was pressed by his creditors and afraid of being discovered by them, and without the deed being properly explained to him, he ratified it. The right of Chambers to enter into such a contract was distinctly denied by Waters, who * resisted the performance of * 695 it as soon as he had appointed another attorney. Under such circumstances a Court of Equity cannot decree specific performance of it. In Sugden on Vendors and Purchasers (a) it is said, " The decreeing a specific performance

(a) Page 337, 3d ed.

is a matter of discretion, but it is not an arbitrary, capricious discretion ; it must be regulated upon grounds that will make it judicial." Here no such grounds exist. The time when the contract was entered into is important. The Court will not decree specific performance unless the case of the plaintiff is perfectly free from imputation and from all blame. A misrepresentation even of the smallest part will prevent the plaintiff from obtaining relief: if he does not come into Court with perfect propriety of conduct, that will be a sufficient answer to his application. In another passage Sir E. SUGDEN says, "If an agent employed to sell an estate, sells it in a manner not authorized by the authority given to him, a specific performance will not be decreed against the principal, although the estate be sold for a greater price than he required for it." (a) And for this position *Daniel v. Adams* (b) is an authority. Where there has been any impropriety on the part of the agent, the Court will be slow to enforce performance of the contract. *Mortlock v. Buller* (c) and *Ord v. Noel*; (d) in the latter of which cases the Court would not compel performance, even in favour of a *bonâ fide* purchaser. The reason of the Court there refusing to interfere was, that the trustee had employed to conduct the sale a solicitor who had an interest in releasing the money as quickly as possible from investment

* 696 * in the property. The principle is, therefore, most clearly established, that an agent must strictly perform his duty, and must not have any interest to induce him to do otherwise. Here it is clear that Chambers did not act in accordance with that principle. The stipulations, that the moment the contract was executed he should be put into possession of the theatre; that if a good title was not made, and renewals of the leases obtained, he was to be treated as a tenant for one year, at a rent of 4000*l.*, the amount of the interest at five per cent on the purchase-money; and that if a fire took place, and the insurance did not cover all the loss, he was to be free from the contract, — were too favourable

(a) Page 162.

(b) Amb. 495.

(c) 10 Ves. 292; see that case affirmed, 2 Dow, 518.

(d) 5 Madd. 438.

for him, and were such as never would have been entered into by an agent who had fairly performed his duty to his principal. There are certain parties who, from the character they hold, cannot be allowed to become purchasers. *Greenlaw v. King.* (a) Chambers was a trustee, and cannot be allowed to buy for himself, and especially upon terms so bad for the vendor that if he had sold to a third person the sale could not have been maintained.

But not only were the parties here acting for their own interests and without regard to the interest of their principal, in a way that equity will not permit, but an additional objection to the contract arises from the fact that Mills was at the very time the solicitor for the vendor. *De Beauvoir v. Rhodes.* (b) This clearly invalidates the whole transaction.

The Solicitor-General and *Mr. Bethell*, for the respondent. — The facts of this case show that Chambers acted throughout with great forbearance towards * Waters, * 697 and that any harsh measures which the former took were forced upon him by the conduct of the latter. If this transaction cannot stand, there is none that may not be impeached. There is no allegation which asserts, nor any evidence which shows, that Waters did not see the agreement before he signed the deed of confirmation. If he did see it, then he must be bound by his own deliberate act; and that he knew the contents of it is plain from his own allegation in the bill, that he remonstrated with Mills upon the terms of it. He could not have remonstrated on the terms of an agreement when he was ignorant of those terms; and if he was not ignorant of them, then his confirmation of them is decisive against him. The charges in Waters's bills of costs, not denied by him to be correct, show that he was attended for the purpose of having this deed explained to him; and his own son, a man of business, attested the execution of it. But the letter of Mr. Leake, who in 1822 had become his solicitor, and who showed any thing but a friendly spirit to Chambers, distinctly recognized the contract: besides, a bill

(a) 3 Beav. 49.

(b) *Ante*, Vol. VI., p. 582.

was filed by Waters against Chambers ; and that bill prayed for an account of the rents and profits of the Opera House received by Chambers, and of the produce of Waters's estates, to be set against the moneys due from Waters to Chambers. This bill was itself an abandonment of any charge of real or constructive fraud ; for, instead of being a bill to rescind the contract, it was a bill asking for an account on the footing of that contract. This bill was filed before the Act which enabled parties abroad to be served with process : to get Waters within the jurisdiction, Chambers pleaded

Waters's outlawry. There were three hearings in * 698 the Court below, and * then no appeal was presented till 1841, exactly twelve years after the final decree.

On the facts, therefore, Waters has not made out any equity to entitle himself to the assistance of the Court.

There is a preliminary objection to this appeal. It states that the decree is wrong in form, in not directing an account of the 250*l*.

[LORD BROUGHAM. — I doubt whether there may be an appeal to this House against a decree for mere matter of form, when that objection to form was not taken in the Court below.

LORD CAMPBELL. — If there was no other objection to the decree, the House might affirm the decree in all other respects, but vary it in that point of form, and might still make the appellant pay the costs.]

Then, as to Mills not being a proper person to negotiate this contract: *Ord v. Noel* (a) is not an authority here, for the circumstances are not such as to raise the point which was there decided. In *Ord v. Noel* the sale was directed for the benefit not only of creditors, but of persons who were interested after the discharge of the debts. In a manner not intended by the decree, the conduct of the sale was given to the solicitor of a particular creditor. He was said to be an

(a) 5 Madd. 438.

improper person ; for as his client was interested only to a certain point, he would not have a motive to get a value for the estate greater than would suffice to meet his client's interest. Here Mills was the solicitor of Waters, who had an interest in the sale at the best possible price, and he himself had the same interest ; for if he could get the Opera House sold at such a price as would pay off Chambers, the whole surplus would be applicable to the payment of his own debt. The fact that the * bargain with the * 699 committee of noblemen at 80,000*l.*, went off because they would not give so much for the Opera House, is decisive to show that that sum was not, as Waters alleges in his bill, grossly inadequate to its value ; and as the sum proposed for the purchase was made known to Waters, the deeds being communicated to him while in France, and as he saw both Mills and his own son in this country some days before he executed the deed of confirmation, it is incredible to suppose that he should have been ignorant of the contents of the agreement.

The agreement was not in itself disadvantageous. The accounts of the receipts and expenditure show that Waters has greatly exaggerated the value of the concern, as well as the amount at which the committee of noblemen would have purchased it.

[LORD BROUGHAM. — I do not go quite so far as to say that a trustee, selling to a third party that which he has been intrusted to sell, is bound to show adequacy of value. If the sale is between himself and the *cestui que trust*, then he must show it, for they are dealing at arms' length ; but not if it is a sale to a third person.]

That is so. The burden, then, in a case of this kind, is upon those who impeach the sale ; and there has not been any attempt here to show that any one person would have given more than has been given by Chambers. The delay in bringing this appeal affords a good ground for the House looking upon it with suspicion. The case is simply one of a contract entered into by parties capable of entering into it,

dealing on equal terms, and agreeing for a fair price; and there is nothing to show why a contract so made should at this distance of time be treated as invalid.

Mr. Russell, in reply. — The objection as to the
 * 700 * delay is answered by the fact of the poverty of Waters. The petition of appeal was presented as soon as possible by the present appellant. It is not pretended that this was such a contract that the parties could have recovered upon it at law: a mortgagee with a power of sale cannot exercise that power, except as a trustee. That was the doctrine of Lord ELDON in *Roberts v. Boson*. A mortgagee may foreclose, but, if he chooses to sell, he must do so as much with a view to the interests of the mortgagor as of himself. Here Chambers had a right, under the contract, to apply the purchase-money in discharge of his own debt: under the previous deeds he had adverse and inconsistent rights. His own interests were, therefore, in opposition to his duty: that itself is sufficient to impeach the sale which he has effected.

September 5.

THE LORD CHANCELLOR. — My Lords, this case was argued in the early part of the session: it was a question depending upon evidence. The point was entered into by the learned counsel at the bar, in great detail; and it was my opinion at the time of the hearing that the transaction to which that evidence referred was made out to be a correct and a fair transaction, and that the agreement was one which a Court of Equity would enforce. I believe that at the time of the hearing that was the impression upon the minds of my noble and learned friends who are now present, and who assisted at the hearing of the cause. I have since that looked at the evidence very carefully, and I retain the opinion which I then formed. I have also examined the terms of the decree,

and I think the details of it are sufficient to give full
 * 701 * effect to the questions which were in issue * between the parties. Under these circumstances I move your Lordships that the judgment be affirmed, provided my noble

and learned friends concur with me in opinion as to the result of this case.

LORD BROUGHAM. — My Lords, I should not have taken any part in this case, it having been a decision of my own in the Court of Chancery, except that it may be satisfactory to state that, having reconsidered the opinion then given by me upon this question, the circumstances of which do not in my opinion raise a doubt upon the law, but which is entirely a question of fact respecting the nature of that transaction, I retain, after having heard the case fully argued here, the opinion which I gave in the Court below.

Lord CAMPBELL fully concurred.

[It was accordingly ordered and adjudged that the appeal be dismissed, and that the several decrees and orders therein complained of be affirmed; and also that the appellant do pay to the respondents their costs in the appeal.]

[591]

1844.

RICHARD FARRELL *Appellant.*
 MARY GLEESON and Another *Respondents.*
 AND
 The said R. FARRELL *Appellant.*
 The said MARY GLEESON *Respondent.*

Judgment. Scire Facias. Statute of Limitations.

A *scire facias* on a judgment is not a mere continuation of a former suit, but creates a new right.

A judgment was obtained in 1813. It was revived by *scire facias* in 1828.

A bill was filed in 1838 in the Court of Exchequer in Ireland against the representatives of the debtor, praying for an account, and that the principal and interest due on the judgment might be satisfied out of the debtor's personal or real estate. Plea of the Statute of Limitations (3 & 4 Will. 4, c. 27, § 40).

Held, that the *scire facias* created new rights, and the plea was no bar to the suit.

Costs.

A case was pending in this House ; the defendant in a similar case made an offer to the plaintiff to be bound by the decision of the House in the case pending. The plaintiff took no notice of the offer, but compelled the defendant to go on with his defence. Judgment was given against the defendant ; he brought an appeal to this House, and prosecuted it to a hearing after an adverse decision in the case previously pending. Judgment being given against him in his own case, he was ordered to pay the respondent's costs.

March 7, 8; September 5, 1844.

THESE appeals arose upon a bill to enforce a judgment which had been revived by *scire facias*. In Trinity term, 1813, a judgment was obtained in the Court of Exchequer in Ireland, by John Gleeson, against Michael Keane, for the sum of 199*l.* 10*s.* In March, 1825, Michael Keane died. In March, 1828, Gleeson also died, leaving his wife, Mary Gleeson, his executrix and sole devisee. In Michaelmas term,

1828, the judgment was redocketed and revived by *scire facias* against the heirs and terre-tenants of Keane. An *elegit* was issued against his lands, and ejectments were brought; but these proceedings had no result. In April, 1838, the original * judgment still remaining unsatisfied, Mary * 703 Gleeson filed her bill in the Court of Exchequer in Ireland against the widow and children of Keane, and against the appellant, who was an incumbrancer on his real estate, praying for the usual accounts, and that payment might be ordered of the principal and interest due on the judgment of 1813; and that if the personal estate of Keane should not be found sufficient to satisfy the same, his real estate might be ordered to be sold and applied in discharge thereof. The appellant pleaded in bar the Statute of Limitations, 3 & 4 Will. 4, c. 27, § 40, (a) alleging that a present right to receive the debt and damages secured by the judgment accrued to John Gleeson in his lifetime, and that he was capable of giving a discharge for and release of the same; and that such present right accrued more than twenty years before the filing of the bill, and that no part of the principal or interest was paid within that time. The appellant also put in an answer. The respondent demurred to the plea, and on the 7th February, 1840, the same was overruled on the authority of a case of *Farran v. Ottiwell*, then recently decided by a large majority of Judges in the Exchequer Chamber. (b)

An offer was then made by the appellant to allow this case to be decided by the result of a writ of error which was brought in this House on the judgment in *Farran v.*

Ottiwell. The respondent took no * notice of that * 704 offer, but compelled the appellant to put in a further

(a) By which it is enacted, "That after 31st December, 1833, no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same; unless in the mean time some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment," &c.

(b) 2 Irish Law Rep. 110; and 2 Jebb & Symes, 97.

answer, to which she replied ; and the cause having come on for hearing on the 2d December, 1840, the Court decreed an account of both the personal and the real estate of Michael Keane, &c., according to the prayer of the bill.

The case of *Farran v. Ottiwell* was decided in this House in 1843, and the judgment of the Court below was reversed, not upon the construction of the Statute of Limitations, but upon a departure in pleading. (a) The present appeals were then pending in this House ; the first being against the order overruling the plea of the statute, and praying relief against that order as at the hearing of the plea ; the second being against the decree of December, 1840.

The Attorney-General and *Mr. Campbell*, for the appellant. — This bill was not founded upon any supposed judgment on the *scire facias*. No new judgment is pronounced on it : all the party gets is a right to issue execution. It is a part of the old proceeding, and not any new matter. The question, therefore, is, whether by issuing a *scire facias*, and so obtaining a right to issue execution, which could not be done without a *scire facias*, a new cause of action is created. “ A present right to receive the same,” as mentioned in the 40th section of the Act, must be understood to mean an immediate right without waiting for any future event ; and it cannot be doubted that such present right accrued to John Gleeson in 1813, and continued to him till his death, and that he was during all that time “ capable of giving a release for, or discharge of the same.” By the language used by

the Judges in *Farran v. Beresford* (b) in the construction * of this Act of Parliament, it does not appear that the judgment there can be considered a decision on the present case. The present right which existed in J. Gleeson is spoken of as if revived by the judgment in the *scire facias* ; an expression, by the way, which is quite incorrect, for there is not a revival of the judgment, the *scire facias* being a mere proceeding to execution.

(a) *Nom. Farran v. Beresford, ante, Vol. X., p. 819.*

(b) *Nom. Farran v. Beresford, ante, Vol. X., p. 819 ; see p. 832 et seq.*

[LORD COTTENHAM. — Suppose a party who has obtained a judgment is dead, is there not a revivor of the judgment in favour of the person who represents him?]

There is not; it is a mere award of execution on that judgment. The language of the Judges is doubtful; they say, "To some purposes, as it seems to us, the judgment in *scire facias* did confer a new right;" but they do not go the length of saying that they entertain a clear or a settled opinion upon the subject, and they render a decision on this point unnecessary by their clear and undoubted opinion, that in the case then before them the plaintiff had been guilty of a departure in pleading; and the Lord Chancellor says that, "upon the record thus framed, the defendant below was entitled to judgment." (a) The other part of the judgment, not being necessary to the decision, may be treated as an *obiter dictum*. The "*scire facias* upon a judgment is only a continuation of the former suit." Tidd's Practice. (b) It must be so; for though it makes a judgment available by showing it not to be satisfied, it does not alter the character or effect of that judgment. It must likewise issue out of the same Court in which the action itself depended, and it must pursue the same form of action, that is, it must be joint or several, as the former was; *and nothing * 706 that could not have been pleaded to the original action can be pleaded to the *scire facias*. This shows it to be nothing but a continuation of the former proceeding; and so in *The Executors of Wright v. Nutt*, (c) the Court ordered the attorney for the executors to *non-pros* a writ of error brought by them on a *scire facias* reviving a judgment against their testator, it being shown that in the original action the testator had agreed not to bring a writ of error. In one sense of the expression, it may be true that every time a party issues a new writ he gets a new right to receive the money; but each of these writs depends on the original judgment; and if that can be successfully impeached, the writ becomes of no avail.

(a) Vol. X., *ante*, p. 889.

(b) 9th ed., p. 1096.

(c) 1 T. R. 888.

All these considerations show that this proceeding by *scire facias* does not create any thing new, and that the rights under it must be referred to the original action.

[LORD COTTENHAM. — Suppose a bond nearly twenty years old, and then a judgment upon it; or suppose an equitable lien nineteen years old, and then a judgment on the security; is that at an end on the expiration of the next year?]

The statute has not provided for such cases. The appellant here was not a party to the *scire facias*, and therefore ought not to be affected by it. Besides, here the respondent does not put forward the *scire facias* as a claim of right, but founds the right entirely on the old judgment. It is upon the demand so put forward that this case must be decided.

The second appeal is in substance the same as the first; the decree complained of in the second decree having merely decided that the plea is not in substance a defence, as the order complained of in the first appeal had decided * 707 that the plea was not a bar to the suit. * Both the order and decree depend on the question whether the *scire facias* creates any new right; and it is submitted that that question must be answered in the negative.

The Solicitor-General and *Mr. Bethell*, for the respondent. — It is a mistake to suppose that the period limited by the statute begins to run from the time of there being a person in existence entitled to receive the money; that is not the meaning of the statute. The statute runs from the time of there being in existence some party who might release the lien on the land, so as to free the real estate from liability. Here it was only in 1828 that, by the effect of the judgment in the *scire facias*, the respondent obtained the right to levy the debt and damages off the land and tenements of the debtor. From that period alone did the statute begin to run. Suppose the money was secured on bond, the period of limitation would not begin to run from the moment when the right to sue on the bond accrued, for the party having

that right alone could not give a release of the property of the obligee, over which he would then in fact have no right that could be the subject of a release ; it would run from the time of the judgment, when, by the force of that judgment, he would have acquired a right over the real estate, which he would then be in a condition, if he pleased, to release. Suppose there was an equitable lien founded on a legal judgment, there must be a person who is not only capable of receiving the money secured, but of discharging the real estate. It may be true that for some purposes the *scire facias* is a continuation of the original suit, but at the same time it gives new rights ; it creates a new lien and a new charge.

* The judgment of this House in *Farran v. Beresford* (a) is in favour of this view ; for though that case was directly disposed of on a question of departure in pleading, the Lord Chancellor said, (b) “ I agree with her Majesty’s Judges in thinking that in this case a new right was acquired by the judgment in *scire facias*.” Assuming, however, that the judgment there was entirely confined to the question of pleading, and that it does not authoritatively decide the present question, then it is submitted that the *scire facias* gives a new right ; that till the *scire facias*, there was no person who could release the charge ; that consequently the statute does not apply, and that the judgment here must therefore be affirmed. It is true that a *scire facias* must issue out of the same Court as that in which the original judgment was pronounced ; but it has other incidents, which show it not to be a mere continuation of the first action. There may be an action of debt upon the judgment on *scire facias*, and it need not be brought in the same Court.

[LORD CAMPBELL. — Where is it stated that debt will lie on a judgment in *scire facias* ?]

In *O’Brien v. Ram*, (c) where Fitzherbert, (d) Leonard, (e)

(a) *Ante*, Vol. X., p. 319.

(c) 3 Mod. 170, 188, 189.

(e) 2 Leon. 14.

(b) *Ante*, Vol. X., p. 339.

(d) Nat. Brev. 282, E.

Rastall's Entries, (a) and Dyer, (b) are referred to. Comyn (c) lays down the same rule, and that rule was adopted in the case of *Paine v. Puttenham*. (d) In the case in Fitzherbert, the action appears to have been held, after argument, to be maintainable. The case of *Barnard v. Tugser* (4 Leonard, 186) is to the same effect.

Here the question is, whether the judgment on the
* 709 * *scire facias* in 1828 was not a charge upon the land?

It was so ; and from that time alone was there a person who, within the terms of the statute, could have given a release.

[LORD COTTENHAM. — In *Kealey v. Bodkin*, (e) the Master of the Rolls says that a judgment *per se* is not a charge upon the land, but is the means by which the party may obtain a lien upon the land by *elegit*.]

That proposition is doubtful. And it is impossible to believe that the legislature, which passed the Statute 9 Geo. 4, c. 35, to allow the registering and redocketing of judgments, should at the same time pass an Act to render such registration and redocketing absolutely useless.

It may be contended that the words "give discharge for or release of the same" apply to a sum of money ; but such an argument will not bear examination. If there was a debt due on a bond, the obligee might release the sum, but the Act refers to a particular sort of release ; it means a release of a right which is sought to be enforced under the authority of law ; something in fact which has become a charge upon land. What is that? It is a right against the land ; it is a right on a judgment, and on one which affects the land. Such is the plain and obvious construction of the words of the section, and the sum of money is no farther material than as showing the amount of that charge upon the land.

(a) 193.

(c) Debt, A. 2.

(e) 1 San. & Scull. 311.

(b) 214 b.

(d) Dyer, 308 a.

The Attorney-General, in reply. — It is impossible by any rule of grammatical construction to say that the word “same,” used twice over in the latter part of the clause, refers to a charge on land; it refers to “any sum of money,” and to nothing else. A *scire facias* merely awards an execution of an existing * judgment. It cannot be a new * 710 action. Notwithstanding a *scire facias* with an award of execution, the original judgment still exists; and if that judgment should be erroneous, the *scire facias* would be inoperative. It cannot be distinct from the judgment, since it must follow the fate of that judgment. A defendant might plead payment before the *scire facias*; and showing in that way a satisfaction of the judgment, he would defeat the *scire facias*; but he could not plead payment before the judgment, because that would be to contradict the judgment. The case of *Barnard v. Tugser* (a) is not an authority for the other side. That was a *scire facias* upon a recognizance; and Mr. Tidd takes the proper distinction as to that, when he says, (b) “A *scire facias* on a recognizance is an original proceeding, but upon a judgment it is only a continuation of the former suit.” The thing secured by the judgment was the payment of a sum of money; the right to that accrued in 1813, and for many years after that time there was a person in existence who had, within the words of the Act, a present right to receive the same, and to give a release for or discharge of the same. The Statute of Limitations has therefore taken effect on this claim, and the judgment of the Court below must be reversed.

September 5.

LORD COTTENHAM. — In 1813, John Gleeson obtained a judgment in the Court of Exchequer in Ireland against Michael Keane. In 1821, Michael Keane executed a settlement, under which the appellant claims interest in land of which Michael Keane was seised at the time of the judgment. In 1825, Michael * Keane died, and under * 711 his will Sarah Keane was his sole devisee and lega-

(a) 4 Leon. 186.

(b) 9th ed. 1096.

tee, and became his personal representative. In 1828 John Gleeson died, and the respondent, Mary Gleeson, who is his personal representative, obtained a judgment on *scire facias*, reviving the judgment of 1813, against Sarah Keane, and the terre-tenants of the land of which John Keane was seised at the time of the judgment of 1813; and sued out an *elegit*, and brought ejectments which were not available.

In 1838 a bill was filed by the representatives of John Gleeson for payment of the judgment debt, out of the personal and real estate of Michael Keane. To this bill the appellant put in a plea of the Statute of Limitations, which was overruled, and forms the subject of the first appeal, as to which it does not seem necessary to say any thing more than that it was clearly overruled by the answer; and the question upon the Statute of Limitations having been raised by the answer and decided at the hearing, forms the subject-matter of the second appeal.

The appellant, after the plea had been overruled, put in his answer, but did not appear at the hearing; and as I collect from the papers, a decree *nisi* was taken and made absolute, upon no cause shown. Against this decree, so made, the appellant has appealed. Being of opinion that the decree was right upon the merits, it is not necessary for me to make any observations upon an appeal being brought to this House by a party who, by the course he pursued, purposely abstained from taking the opinion of the Court below upon the point raised by the appeal, and submitted to a decree *nisi* being made absolute against him, without showing cause upon the point insisted upon before this House.

* 712. * The appellant relies upon the 40th section of 3 & 4

Will. 4, c. 27. The respondents meet this defence by saying, that by the judgment in *scire facias* in 1828, it was adjudged that they, the respondents, should have execution against the terre-tenants for the debt and damages aforesaid, to be levied off the lands and tenements aforesaid; and insist that by this judgment a present right accrued to them to receive the debt in question, and that their bill was filed within twenty years from that time. This point arose in a case in this House, and was the subject of a question put to the

Judges during the last session ; I mean the case of *Farran v. Beresford*. (a) In that case the judgment was of the year 1810 ; the plaintiff having died, his representative revived the judgment by *scire facias* in 1817, and the Judges gave their opinion that this judgment on *scire facias* conferred on the plaintiffs a new right within the 3 & 4 Will. 4, c. 27, § 40 ; and although the case was disposed of upon a question of defect in pleading, the noble and learned Lords who attended the hearing of that cause concurred in the opinion of the Judges : the Lord Chancellor said, "I agree with her Majesty's Judges in thinking that in this case a new right was acquired by the judgment on *scire facias* in 1817."

I entirely concur in the opinions expressed in that case, and think that they ought to decide the present. I therefore move your Lordships that the decree be affirmed, with costs.

Mr. Stephens, the agent for the appellant, submitted, that as the respondent had declined the appellant's offer to allow this case to be decided by that * of *Farran v. Beresford*, and had compelled him to put in his answer and go on with the proceedings, she ought not to have costs. * 713

LORD COTTENHAM. — The question between the parties may be, whether they agreed to be bound by the decision in *Farran v. Beresford* or not ; but whether they agreed to it or not, *Farran v. Beresford* having been decided, and the very same question arising in both cases, this House of course would pronounce the same judgment in both ; it is quite immaterial, therefore, whether they agreed to be bound by the decision in *Farran v. Beresford* or not. The effect of the judgment is to affirm the decree below, which is in conformity with the decision in this House in *Farran v. Beresford*.

[It was ordered and adjudged that both the appeals be dismissed, and that the order and decree therein respectively

(a) *Ante*, Vol. X., p. 319.

complained of be affirmed; and also that the appellant do pay to the respondent, Mary Gleeson, her costs in both appeals.]

1842.

ELIZABETH METFORD CHARTER (*a*) and THOMAS } *Appellants.*
 PATTON }
 SIR JOHN TREVELYAN, Bart., and Others . . . *Respondents.*

Fraud. Solicitor and Client. Purchase. Lapse of Time.
Arbitration.

A. was the solicitor and land agent of B., who was desirous of selling an estate, and in a letter to A. expressed his readiness to sell it for 13,000 guineas. The estate consisted of two portions, and a land-valuer (whose valuation was not shown to have been communicated by A. to B.) put upon the two portions separate values which, added together, exceeded the 13,000 guineas. A. sold part of the estate to C. for a sum exceeding the valuer's estimate of that portion, and then purchased the other portion for a sum much less than that stated in the estimate, but which, added to C.'s purchase-money, just made up 13,000 guineas. A. pretended that the latter purchase was made by one of his relatives, and the conveyance from B. was executed to that relative, but immediately afterwards a conveyance was executed from the relative to A., and in that conveyance was a recital that the purchase-money was furnished by A. These facts were not discovered till thirty-seven years afterwards, and then B. filed his bill against the representatives of A. (who had died seventeen years before), to set aside the latter conveyances, and to have an account.

Held, that the circumstances of the transaction were of a fraudulent nature,¹ and therefore furnished an answer to the objection arising

(*a*) This appellant died after the appeal was argued; it was revived in the name of William Metford, her executor.

¹ See 2 Sugden V. & P. (8th Am. ed.) 689, and cases in note (y). As to purchases made by parties acting in a fiduciary capacity indirectly through third persons, see *Davoue v. Fanning*, 2 John. Ch. 252; *Paul v. Squibb*, 12 Penn. St. 296; *Woodruff v. Cook*, 2 Edw. Ch. 259; *Hawley v. Cramer*, 4 Cowen, 717; *Buckles v. Lafferty*, 2 Rob. 294, 300; *Hunt v. Bass*, 2 Dev. Eq. 292; *Dobson v. Racey*, 3 Sandf. Ch. 60.

upon the length of time during which the transaction had remained unimpeached.²

Held, also, that the bill was sustainable, though disputes which had arisen between A. and B., as to their mutual accounts, had been referred in A.'s lifetime to a barrister, who was empowered to inquire into all matters of difference between them ; and who, after awarding the payment of a certain sum by A. to B., had directed the execution of mutual releases of all matters in difference ; and such releases had been executed.³

Practice ; Bill of Review.

A petition for a bill of review was presented, on the ground of a discovery made (soon after the decree in the cause) that some copies of papers therein put in evidence were not in conformity with the originals.

Held, that as these papers could not of themselves have led to a different result, the petition for leave to file a bill of review had been rightly dismissed.

April 14, 21, 22, 25, 26, 28, 29 ; May 5, 30 ; June 2, 1842. September 5, 1844.

THIS was a suit to set aside a conveyance of the manor of Seaton, and other property at Seaton, in the * county of Devon, which had, in the year 1788, * 715 been obtained from the late Sir John Trevelyan, baronet, the father of the respondent, by his steward, the late Mr. Thomas Charter, under whom the appellants claim.

The late Sir John Trevelyan was, in the year 1770, possessed of very considerable estates in the counties of Devon and Somerset, and among others of the said estate at Seaton, in the former county ; which estate consisted of the manor or lordship of Seaton, with a sea-beach and other manorial rights belonging to the manor ; of a manor-house and de-

² In cases of concealed fraud, the right to relief is deemed to first accrue at the time when the fraud shall, or with reasonable diligence might, have been known or discovered. 2 Story Eq. Jur. §§ 1521, 1521 a ; Phalen v. Clark, 19 Conn. 421 ; Blair v. Bromley, 5 Hare, 559 ; s. c. 16 L. J. Ch. 108 ; 1 Dan. Ch. Pr. (4th Am. ed.) 644, 645 and cases cited in notes ; Dodge v. Essex Ins. Co., 12 Gray, 65, 71 ; 1 Sugden V. & P. (8th Am. ed.) 254 and note (r¹) ; Doggett v. Emerson, 3 Story, 700 ; Gould v. Gould, 3 Story, 516 ; McClure v. Ashby, 7 Rich. Eq. 430.

³ See De Montmorency v. Devereux, 7 Cl. & Fin. 188, note (1) and cases cited ; *post*, 740 and cases cited in note (2).

mesne lands, and of a great number of dwelling-houses, lands, and hereditaments, which were let on leases for lives of various ages, on small conventional or chief rents.

Mr. Thomas Charter, who was an attorney residing and practising at Bishop's Lydeard, in the county of Somerset, was the steward and receiver of rents for those estates; and Sir John Trevelyan, who resided principally in London, left to him the whole management of them. Thomas Charter was also employed by Sir John Trevelyan as his solicitor and confidential agent in many other matters during the same period; and he had, by these means, prior to the year 1785, become possessed of the trust and confidence of Sir John Trevelyan to a very great degree.

In 1785, Sir John Trevelyan became desirous of selling the Seaton estate; and with his approbation Thomas Charter employed Mr. Samuel Kingdon, of Milverton, in the county of Somerset, a land-surveyor and valuer of great experience, to make a valuation of all the portions of that estate. Mr. King-

don accordingly surveyed them, and made a written
 • 716 valuation • thereof, which he delivered to Thomas Charter, as the agent of Sir John Trevelyan. The valuation, which was entitled "An estimate of the value of the manor of Seaton, in the county of Devon, the property of Sir John Trevelyan, baronet," contained, first, a valuation of the demesnes; secondly, a valuation of the lands out on lease, therein described as leaseholds; and it gave the gross yearly value, the particulars of all the outgoings, the clear yearly value and the value in fee to sell, so as to give to the purchaser $3\frac{1}{2}$ per cent on his money. The demesne lands were put down at a sum of 13,184*l.*, and the reversions were estimated at 4790*l.* 13*s.*; but Mr. Kingdon added that if the houses were sold to the lessees separately, they might fetch considerably more than the sum he had put upon them.

The valuation did not include the manor-house and garden, the sea-beach, and other manorial rights belonging to the manor.

In the course of the years 1786 and 1787, Thomas Charter sold for Sir John Trevelyan the reversions of several lands and tenements at Seaton, part of the lands held on leases for

lives included in the valuation. They were sold to different persons for various sums, amounting together to 1284*l*. The value put upon these reversions by the valuation, so as to give the purchaser $3\frac{1}{2}$ per cent, was 1265*l*. 12*s*. The sums produced by these sales appeared by an account in the handwriting of Thomas Charter.

In the year 1787, Thomas Charter, on behalf of Sir John Trevelyan, entered into a treaty first with Sir John Pole, and afterwards with a Mr. Maurice Lloyd, for the sale of the Seaton property, for the sum of 13,650*l*. Neither of these gentlemen became the purchaser; * and on the * 717 15th of April, 1788, Sir J. Trevelyan wrote to Thomas Charter that he should have no objection to receive 13,000 guineas for Seaton at any time, and the sooner the better, as he knew how to apply the money.

In May, 1788, after the treaty with Maurice Lloyd had been put an end to, Thomas Charter, on behalf of Sir John Trevelyan, agreed with the trustees of Sir Thomas Acland, baronet, to sell to them the whole of the demesne lands of the manor of Seaton then remaining unsold, for the sum of 12,500*l*. This agreement was afterwards varied by reserving out of the demesne lands $13\frac{1}{2}$ acres, herein after called the excepted demesnes; and for the purpose of fixing the deduction which was to be made from the said purchase-money, in respect of the excepted demesnes, Mr. Kingdon was employed to put a value upon the latter. Mr. Kingdon accordingly made that valuation, and fixed the sum of 425*l*. 14*s*. as the value in fee, so as to give the purchaser $3\frac{1}{2}$ per cent for his purchase-money. Thomas Charter made alterations in this valuation which increased the value to 476*l*. 5*s*. That sum, as the value of the excepted demesnes, was accordingly deducted from the purchase-money agreed to be paid by Sir Thomas Acland's trustees, and their purchase-money was thereby reduced to the sum of 12,023*l*. 15*s*.; and the sale to them was concluded at that price, and was carried into effect by deeds of conveyance dated the 24th and 25th March, 1788. •

The whole of this treaty with the said trustees was carried

on and settled by Thomas Charter without the intervention of Sir John Trevelyan.

After the sale to Sir Thomas Acland's trustees, Thomas Charter reported to Sir J. Trevelyan that he had
 * 718 also sold to a Mr. James Charter, of Exeter * (who was a cousin of Thomas Charter), all the remaining reversions at Seaton belonging to Sir John Trevelyan, for a sum which, with the money to be paid by Sir Thomas Acland's trustees for the property purchased by them, would make up 18,650*l.*, the price which had been previously offered by Mr. Lloyd ; and Sir John Trevelyan executed indentures dated the 1st and 2d May, 1788, being a conveyance to James Charter of the property said to be purchased by him (and to set aside which was the principal object of the suit). These deeds were prepared by Thomas Charter, and he was one of the attesting witnesses to them.

Indentures of lease and release, dated 1st and 2d June, 1788, and made between James Charter of the one part and Thomas Charter of the other part, were executed by James Charter ; and by the latter deed, after reciting the conveyance to James Charter by the said deeds of the 1st and 2d May, 1788, and reciting that the purchase-money or consideration mentioned in such deeds was the proper money of Thomas Charter, and that the name of James Charter was made use of in the said conveyance upon trust only for Thomas Charter, his heirs and assigns, and that Thomas Charter had requested James Charter to convey the said manor or lordship, hereditaments, and premises to him, Thomas Charter, his heirs and assigns, he, James Charter, for the nominal consideration of 5*s.*, conveyed and assured unto and to the use of Thomas Charter, his heirs and assigns, all the premises comprised in the indenture of the 2d May, 1788, and thereby conveyed and assured by the said Sir John Trevelyan to him the said James Charter, with their appurtenances.

This conveyance from James Charter to Thomas Charter was wholly concealed from Sir John Trevelyan ; as
 * 719 * was the fact that Thomas Charter, and not James Charter, had been the real purchaser of the property.

Thomas Charter ceased to act as the solicitor and steward of Sir John Trevelyan in the year 1806; and disputes arose between them, which were finally referred to arbitration. In the course of the proceedings under the reference, in which the arbitrator was to arbitrate on all "actions, causes of action, suits, controversies, claims, and demands" between the parties, certain queries to be put to Thomas Charter, prepared by Mr. Boucher, who acted as solicitor to Sir John Trevelyan, were used. Among them was the following; "What were the last reversions of the leaseholds in Seaton sold for; and to whom was the purchase-money paid?"

Thomas Charter gave the following answer in writing: "The last reversions were sold and conveyed to Mr. Charter of Exeter, for 1626*l.* 5*s.*; and went in discharge of 1668*l.* 15*s.*, principal and interest, on mortgage of Middleton to Harding & Glubb, as executors of Mr. Rogers of Pilton."

Mr. Boucher having, in the course of the reference, written a letter to Thomas Charter, in which he required him to produce before the arbitrator, among other documents, "all the rentals and last surveys, and likewise the contract for Seaton," Thomas Charter, at a meeting before the arbitrator, which was held at Wells on or about the 20th January, 1808, produced the contract with Mr. Lloyd, mentioned in the previous part of this statement, altered in its date to 18th March, 1788, and altered so as to be a contract with James Charter of Exeter, for the sale to him, James Charter, of the manor of Seaton, and all the lands within it not sold and conveyed to other persons, and *purporting to * 720 have been signed by James Charter, and with the following indorsement upon it, in the handwriting of Thomas Charter:—

"Contract for Seaton, drawn for Mr. Lloyd, of Dillington; consideration money, 18,650*l.*

"Mr. Lloyd refused to sign the contract, without Sir John Trevelyan would first allow him 46*l.* 14*s.* out of the purchase-money above mentioned, for the reversion of a field called Foxhole, which was included in Mr. Kingdon's esti-

mate, but had been sold afterwards and not struck out, and therefore Sir John agreed to allow it ; but after that, Mr. Lloyd required a further reduction of 200*l.* for the repairs of the seabank, which Sir John refusing to make, the treaty broke off, and Sir John afterwards received the full purchase-money of 13,650*l.* for it, without the deduction of the 46*l.* 14*s.*, as under :

“ Of Sir Thomas Acland’s trustees . . .	£12,023	15	0
Of Mr. Charter	1,626	5	0
	<hr/>		
	£13,650	0	0

“ Sir Thomas Acland’s money was paid by a draft on Hoares, and Mr. Charter’s money to Child, and went to the discharge of 1668*l.* 15*s.*, principal and interest, due on the mortgage of Middleton to Harding & Glubb, executors of Mr. Rogers.”

Thomas Charter also, on the occasion of the reference, delivered to Mr. Boucher, some time in the year 1808, an account, which was wholly in the handwriting of Thomas Charter, entitled “ A particular of the estates belonging to Sir John Trevelyan, baronet, in Devon and Cornwall, sold in the years 1785 and 1786 ; with an account of the
* 721 purchase-money * for each estate, and how applied.”

Among the items on the debtor side of this account, are the following : “ Manor of Seaton, in two lots, to different people : Lands in demesne, 12,023*l.* 15*s.* ; reversions of tenements out on lease, 1626*l.* 5*s.*”

And on the other side of this account, among other items, is the following : “ Mr. Charter also received the purchase-money for the last reversions of Seaton, towards discharging the principal and interest moneys due on the mortgage of Middleton, for which it was applied, 1626*l.* 5*s.*”

The only question discussed before the arbitrator was the amount of the balance due upon the accounts between the parties ; and by his award he directed the sum of 1147*l.* 9*s.* to be paid by Thomas Charter to Sir John Trevelyan, and mutual releases to be executed “ of all actions, causes of

action, controversies, claims, and demands" between them. Releases were accordingly executed in the manner directed by the award.

Thomas Charter died in 1810. Thomas Malet Charter, his executor, and also his heir-at-law, upon his death took possession of all his real estate.

In 1814, and again in 1824, T. Malet Charter was called upon by Sir J. Trevelyan to deliver up some old papers; but no further communication took place between them till the 3d of December, 1825, when Mr. Nicholas Broadmead, the solicitor of Thomas Malet Charter, sent to Mr. White, the solicitor of Sir John Trevelyan, the following letter:—

"Dear Sir,—The manor of Seaton and certain lands in that parish formerly belonged to Sir John Trevelyan, who sold them to Sir Thomas Acland, of whom they were purchased by the late Mr. Charter: Mr. Charter, of Lynchfield, his son, has commissioned * me to apply to you * 722 for an attested copy of a surrender, which by his father's books appears to have been made by Sir John's mother to him, in the year 1784, of the above property. Mr. Charter has attested copies of the other title-deeds, and wishes particularly to have one of this; and expedition being an object, you will confer an obligation both on him and myself by doing it immediately, and your fees for a journey to Nettlecombe, if necessary, and the attested copy, will be paid with pleasure."

The statement in this letter, that Sir John Trevelyan had sold the manor and other lands in Seaton to Sir Thomas Acland, of whom they were purchased by the late Mr. Charter, being contrary to the representations which had always been made by Thomas Charter to Sir John Trevelyan, that this property had been sold to Mr. James Charter, of Exeter, led to an investigation of the matter by the solicitor of Sir John Trevelyan, the result of which was, that Sir John was satisfied that a fraud had been practised on him by Thomas Charter in the sale of the property.

On the 4th of July, 1827, Sir John Trevelyan filed his

original bill in Chancery against Thomas Malet Charter, praying that he, T. M. Charter, might be decreed to deliver up to Sir J. Trevelyan all title-deeds, &c., relating to the estates of Sir J. Trevelyan, and then in the custody of T. M. Charter, or of any other person, for his use; and that it might be declared, that under the circumstances therein mentioned, the sale of the said premises at Seaton was fraudulent, that T. M. Charter might be ordered to reconvey the same to Sir J. Trevelyan, and to account for the rents and profits thereof since the sale of the same.

• 723 * In April, 1828, Sir John Trevelyan (before T. M. Charter had put in his answer) died, having made his will, whereby he made the respondent, who was his heir-at-law, his residuary devisee and his executor.

In June, 1828, the respondent filed his bill of revivor against T. M. Charter: and on the 16th of September, 1831, T. M. Charter put in his answer; but other circumstances having in the mean time and by the answer been discovered by the respondent, he filed an amended and supplemental bill on the 4th of May, 1832, introducing the necessary allegations and charges, but concluding with the same prayer as in the original bill.

On the 3d of November, 1832, T. M. Charter filed his answer to the amended and supplemental bill.

The cause came on for hearing before Sir C. C. PEPPYS, Master of the Rolls, on the 27th, 28th, and 29th days of January, 1835. On the 2d of June, 1835, (a) his Honor pronounced a decree in conformity with the prayer of the bill.

On the 4th of January, 1836, T. M. Charter died; and the directions of the decree not having been complied with, the respondent filed his bill of revivor against the representatives of T. M. Charter, and on the 13th of July, 1837, the Master of the Rolls made a decree directing the former decree to be carried into effect.

On the 19th of December, 1839, the appellants presented a petition for leave to file a bill of review, alleging the discovery of various matters which showed that the original

(a) Law Journal, vol. 4, New Ser., Chancery, p. 209.

decree was made in mistake of the real facts of the case ; and, among other things, alleging that the answer of Thomas Charter to one * of the queries put by Mr. * 724 Boucher was not that "the last reversions were sold and conveyed to Mr. Charter, of Exeter," but that "the last reversions were sold to Mr. Charter," and that the other words had been by some error introduced into the copy, which they submitted proved that Thomas Charter had not untruly represented the sale to have taken place to his cousin James, when in fact it took place to himself. The petition came on to be heard before the Master of the Rolls on the 21st of January, 1840, when his Lordship ordered it to be dismissed with costs.

The present appeal is against the decrees made in the original and supplemental and revived suits, and against the order made on the petition for leave to file a bill of review.

Sir T. Wilde and *Mr. Swanston* (*Mr. Goldsmid* was with them), for the appellants. — The principles of equity have not been observed in this case. Nothing but wilful fraud on the part of Thomas Charter could justify the Court in opening up a transaction which had been settled so long ago as 1788; nor would the existence of fraud be sufficient for such a purpose, if the party seeking to set aside the transaction had the means of knowing the nature of the circumstances, and had delayed for an unreasonable time to act upon that knowledge. *Gregory v. Gregory.* (a) There a period of eighteen years was considered a bar to proceedings of this sort: here a very much longer period has elapsed. For nearly twenty years after the conveyance of the premises, Mr. Thomas Charter and Sir J. Trevelyan were on good terms; after that disputes arose between them, and all their dealings with each * other were submitted to * 725 arbitration. The arbitrator was a barrister, — a very material circumstance in the case. The investigation then gone into was long and searching, as the numerous documents produced and the stringent nature of the questions put

(a) Coop. 201, 1 Jac. 681.

to Thomas Charter amply prove. Nothing was then alleged to have been fraudulently done, and all that was charged related to matter of difference of accounts. But that investigation gave the opportunity for inquiring into every thing; and after such an opportunity afforded and used, when the nature of the purchases and sales must have been considered, the transactions between these parties must be treated as finally closed. Such, at least, was the principle adopted in *Auriol v. Smith*, (a) which declared that awards under the 9 & 10 Will. 3 must be regulated by that statute; and that with respect to the period within which application must be made to set them aside,—a case even of fraud did not constitute an exception. The arbitration, therefore, was a bar to the right of the party to proceed with his bill in equity; for as the award directed mutual releases of all claims, which releases were duly executed, this bill is in fact, without being so in form, a proceeding to set aside that award and the releases executed under it, and cannot, upon the authority of the case just cited, be sustained even upon a ground of fraud.

But there was no proof of fraud in this case. The estate was sold for the very sum for which Sir J. Trevelyan had said, in his letter of April, 1788, that he should be glad to sell it. He did not, therefore, receive any injury; he got what he asked, and no unfair advantage was taken of him.

Upon the purchase thus made the purchaser entered * 726 into possession, and remained * in undisputed possession for between thirty-five and forty years. Now the case of *Cholmondeley v. Clinton* (b) settled, that where there has been an adverse possession, not accounted for by some disability, as coverture or infancy, for twenty years, a Court of Equity ought not to interfere. The present is a much stronger case, for here the time has been nearly double that which is there put as the limit; and there have been contests and investigations between the original parties, and mutual releases executed by them. The policy of the Statutes of Limitation has been wholly disregarded in this case, and a

(a) Turn. & Russ. 121-126.

(b) 1 Turn. & Russ. 107.

long undisputed possession has been disturbed after the estate has passed into the hands of the grandson of the first purchaser. This is the greater hardship, because it is highly probable that had the transaction been questioned, even after the lapse of twenty years, while the original parties were alive, that which may now appear to require some explanation could have been fully explained. That principle was stated even in *Randall v. Errington*, (a) though there the purchase was set aside; and it was distinctly adopted and acted on in *Champion v. Rigby*, (b) where, after a delay of eighteen years had taken place, a bill filed by the client against his solicitor, to avoid a purchase made by the latter, was dismissed. In *Gregory v. Gregorg* (c) a bill filed, after the lapse of eighteen years, to set aside a purchase made by a trustee for the benefit of himself and children, was dismissed on the ground of length of time alone. And in *Blennerhasset v. Day* (d) it was held that if the facts were within the knowledge of the party, and he lay by for twenty-five years, he * could not then go to equity * 727 for relief. *Aylward v. Kearney*, (e) which was relied on in the Court below, is distinguishable; for there a personal disability existed, the party being of weak understanding.

The authorities, therefore, show that nothing but a case of gross fraud or personal disability can excuse a long delay. Gross fraud did not exist here; Sir J. Trevelyan got the sum which he himself put upon the estate, and his solicitor was entitled to sell it at that price. If the sale, at that price, had been made to any other person, there would not have been even a pretence for questioning the transaction. There is nothing beyond a mere pretence here, — a pretence founded on a rule of equity the authority of which is not disputed, but which is not applicable to the circumstances of this case. The bill ought to have been dismissed; and the decree which sustained it is erroneous, and ought to be reversed.

Then as to the petition for leave to file a bill of review: it

(a) 10 Ves. 423.

(b) 1 Russ. & My. 539; Tamlyn, 421.

(c) Coop. 201; affirmed 1 Jac. 681.

(d) 2 Ball & B. 104.

(e) 2 Ball & B. 463.

is clear that the original decision in the Court below was founded in error of fact. The answer to the query put by Mr. Boucher to Thomas Charter was taken as decisive, because by that answer Thomas Charter appeared to have represented, at the time of the arbitration, that the purchase had been made by James Charter; so that the defence set up to the bill, that the purchase had all along been known as Thomas Charter's, and that he had dealt with the property as his own, rebuilding the mansion-house and receiving as his visitors members of the Trevelyan family, was supposed to be rebutted by his own written statement. But the newly discovered evidence showed that that written statement had been * 728 wrongly copied, or words afterwards inserted in it which were not put there by Thomas Charter. The foundation of the decision against him was therefore destroyed; the fact on which he was sought to be charged was at an end, and he was entitled to a bill of review. On both points, therefore, the appellants are entitled to have the decrees and order complained of reversed.

The Solicitor-General and *Mr. Pemberton*, for the respondent. — The principles applicable to a case of this kind are well settled by many authorities. An attorney or agent may contract with his client, but he must do so subject to the burden of proving that, in entering into the contract, he did not take advantage of his situation to benefit himself at the expense of his client. *Randall v. Errington*, (a) *Montesquieu v. Sandys*, (b) *Medlicott v. O'Donnell*, (c) *Bulkley v. Wilford*, (d) and *Carter v. Palmer*. (e) That was not shown here; it could not be shown; for the facts distinctly proved that Thomas Charter had taken advantage of his situation to benefit himself at the expense of his client. In the first place, there was no distinct proof that he had made Sir J. Trevelyan acquainted with the valuation put upon the property by Mr. Kingdon. The letter which expressed the readiness of Sir J.

(a) 10 Ves. 427.

(b) 18 Ves. 302.

(c) 1 Ball & B. 156.

(d) *Ante*, Vol. II., p. 102.(e) *Ante*, Vol. VIII., p. 657; and see *Hamilton v. Wright*, *ante*, Vol. IX., p. 111.

Trevelyan to sell the estate for 18,000 guineas, was written at a time when he was pressed for money, when he found there was little prospect of a sale, and when it is at least doubtful whether he knew any thing whatever of the valuation. * But it is not because a client so expresses * 729 himself, that his solicitor is entitled to turn that client's expressions to his own advantage; and though his client's property would sell for more, to sell it only for the sum named, receiving for himself the benefit of the difference. Here Sir T. Acland's trustees gave more for the part they purchased than Mr. Kingdon's valuation had put upon it; and Thomas Charter, taking advantage of that circumstance, purchased the remainder for himself, not at the fair and proper price, not at the price put upon it in the valuation, but only at such a sum as, with the trustees' money, would make up the amount for which Sir J. Trevelyan had said that he would sell the whole estate. Was not this fraudulently taking advantage of his situation, to benefit himself at his client's expense? But beyond this, it is clear that he included, under the sale of the reversions, property that did not fairly come under that denomination; and thus got a double benefit to himself at the expense of his client. And then, again, the sale was pretended to be made to a third person, when he himself was the real purchaser. To cover this fraud, double sets of deeds were prepared by Thomas Charter; the first from Sir J. Trevelyan to J. Charter; the others (in which the fraud in the first was distinctly avowed), from J. Charter to himself. The original decree was fully justified by the circumstances of the case, and must be affirmed.

Then as to the order on the petition for a bill of review: it is said that the query put by Mr. Boucher was found to have been miscopied. There is great reason to doubt whether allegation could have been sustained by proof; but suppose it could, it would not have amounted to any thing.

The fact * that James Charter of Exeter, was not spe- * 730 cifically described in that one answer, as the purchaser, could not affect the case. At the utmost it was a mere omission, which left the description just as applicable to James as it did to Thomas Charter. But there was the

deed of conveyance, about which there could be no doubt; and there was the indorsement on the draft, also free from doubt, in which James Charter was specifically described; and, finally, there was the conveyance from J. Charter to Thomas Charter, which recited the other conveyance, and contained the distinct allegation that the property was purchased for Thomas Charter, and with his money. The order dismissing this petition was perfectly correct, and must be sustained; and this appeal must on both points be dismissed, and with costs.

September 5.

THE LORD CHANCELLOR. — My Lords, the charge in this case is, that Thomas Charter, being employed by Sir John Trevelyan to sell his estate at Seaton, purchased a part of it on his own account, without the knowledge of his employer, in the name of a relation, James Charter, of Exeter; and that this purchase was made at considerably less than its real value.

The property consisted of demesne lands in fee, of leaseholds for lives, of a manor-house, of certain manorial rights, and of a piece of marsh land called Axmouth Marsh. There was some difficulty in finding a purchaser. An offer had been made by Mr. Lloyd, and an agreement prepared by Thomas Charter for the sale to him of the property for 13,650*l*. This

treaty, which seems to have been a mere speculation on
 * 731 the part of Lloyd, was afterwards put an end to. * The property had been valued by Mr. Kingdon, a surveyor, at the desire of Sir John Trevelyan. The demesne lands were estimated by him at 13,184*l*.; the reversions at 4790*l*.; total, 17,974*l*. In this valuation the interest of money was taken at 3½ per cent. It does not seem clear that the valuation was ever seen by Sir John Trevelyan. It remained with Mr. Thomas Charter, and was produced from among his papers after his death. Sir John Trevelyan was quite satisfied to part with the property for the sum offered by Mr. Lloyd, and so expressed himself in a letter addressed to Mr. Charter. An agreement was made by Charter with James Charter of Exeter, his cousin, in pursuance of which the

latter signed an agreement for the purchase of the whole of this property at the sum offered by Mr. Lloyd, viz., 13,650*l*. It was, in fact, the same agreement which had been prepared for Mr. Lloyd, with some alterations substituting the name of James Charter for that of Maurice Lloyd.

About the same time Charter agreed with Sir Thomas Acland's trustees for the sale to them of a part of the property, viz., the demesne lands, for the sum of 12,500*l*. Some small parcels, amounting to 13½ acres, were afterwards, by Thomas Charter's desire, excepted out of this purchase. The value of these excepted demesnes was estimated by Mr. Kingdon at 425*l*. 14*s*., which was afterwards increased by Mr. Charter to 477*l*. This sum was deducted from the amount agreed by the trustees to be paid for their purchase, and the corresponding portion of the demesnes was excepted from the conveyance.

The whole of this arrangement with the trustees was conducted by Mr. Charter, without any interference * on the part of Sir John Trevelyan, who appears not * 732 to have been aware that any negotiation with the trustees was depending. Conveyances were afterwards executed to the trustees and to James Charter. The conveyance to James Charter was generally of all the manor of Seaton, except such parts as had already been sold and conveyed by Sir John Trevelyan to different persons. In the following month, the property so conveyed to James Charter was by him conveyed to Thomas Charter; the deed of conveyance stating that the purchase-money was Thomas Charter's, and that James Charter purchased as a trustee for him.

This, then, is the case of a purchase, on his own account, by an agent intrusted to sell; and the questions to be considered are, whether this transaction was concealed from his principal? Whether the purchase was made at an under-value? And lastly, whether the time that has elapsed since this transaction took place is a bar to the suit?

Where an agent employed to sell becomes himself the purchaser, he must show that this was with the knowledge and consent of his employer, or that the price paid was the full

value of the property so purchased; and this must be shown with the utmost clearness, and beyond all reasonable doubt.¹ As to the first requisite, so far from its being established that the purchase was made by Thomas Charter with the consent or knowledge of Sir John Trevelyan, the evidence tends strongly the other way. It appears by the correspondence, that after the treaty with Lloyd was broken off, some suggestion was made by Thomas Charter as to the selling a part or the whole of the leaseholds, so as to make up, with the sale of the rest of the property, the sum which was to
* 733 have * been paid by Lloyd. Charter appears to have gone to Exeter for this purpose. Soon afterwards Sir John Trevelyan, in answer to a letter from his agent, stated that he had no objection to receive the 13,000 guineas for Seaton at any time, and the sooner the better; and again, in another letter, written three days afterwards, he asks whether Charter's cousin would advance any money, as "concerted," he says, "between you and myself." These letters are dated 10th, 13th, and 18th of April, and lead to the inference that James Charter, of Exeter, was in some way to be interested in the purchase of this property, and, as it would seem, in the purchase of the leaseholds.

About the same time a treaty was going on between the trustees of Sir Thomas Acland and Thomas Charter, for the purchase of the demesnes. This was not communicated to Sir J. Trevelyan till it was completed, or upon the point of being so. He discovered it by accident, and complained that it had been concealed from him. In the result, Sir Thomas Acland's trustees became the purchasers of the demesne lands, with the exception of the small portion already mentioned, amounting to about 13½ acres, at the price of 12,023*l*. And the rest of the property, under the general description of "all that manor or lordship of Seaton, except such parts and parcels thereof, in possession or reversion, which have been already sold and conveyed to different persons by Sir John Trevelyan," was conveyed to James Charter, for the

¹ See *Holman v. Loynes*, 4 De G., M. & G. 270.

sum of 1627*l.*; making up, with the 12,023*l.*, the 13,000 guineas for which, in the letter of the 15th of April, Sir John Trevelyan said he was willing to sell the property.

Up to this period Sir John Trevelyan had no reason to suppose, from any thing that appears in the transaction, that James Charter was not the real * purchaser. The * 734 whole affair had been entirely conducted by Thomas Charter, in whom he appears to have placed entire confidence.

It is contended, on the part of the appellants, that Sir John Trevelyan must have known that Thomas Charter was the purchaser, from the circumstance that some members of his family had visited Seaton; that Mrs. Trevelyan and her husband had resided for some time in the manor-house, which had been rebuilt by Thomas Charter; that Edward Trevelyan had sported over the manor with Thomas Charter's permission; and that these facts must have come to the knowledge of Sir John Trevelyan. But I think no safe inference can be drawn from these circumstances. The visits did not take place, as I collect from the evidence, till several years after the sale. Sir John Trevelyan lived at a distance; and if he continued to take any interest in the property, there was nothing to lead him to suppose that Thomas Charter might not have been acting as agent for James Charter with respect to it, or that he might not have become a purchaser or a part purchaser of it from him. As to the court of the manor being held in Thomas Charter's name, it does not appear that this was known to Sir John Trevelyan.

Another circumstance relied upon by the appellants is the arbitration in the year 1808, with what occurred upon that occasion; but this part of the evidence leads, I think, to the conclusion that James Charter was still represented as the purchaser. In one of the documents before the arbitrators, Mr. Charter states that he received the sum of 1626*l.* 5*s.* 8*d.*, the purchase-money of the last reversions at Seaton, towards discharging the principal and interest due on a mortgage; for which purpose it was applied. In * another * 735 document, produced by Thomas Charter, it is stated that Sir John received the full purchase-money for Seaton, 13,650*l.*, as under:—

" Of Sir Thomas Acland's trustees	£12,023	15
Of James Charter	1,626	5
	<hr/>	
	£13,650	0"

The third document purported to be an answer to certain queries put to Mr. Charter, on the part of Sir John Trevelyan. One of those queries was in these words: "What were the last reversions in Seaton sold for, and to whom was the purchase-money paid?" The answer given was, that the last reversions were sold and conveyed to Mr. Charter, of Exeter, for 1626*l.* 5*s.* It was objected that this document, which purported to be a copy of queries and answers, was not admissible in evidence; but in the paper of admissions signed by the solicitors, it was agreed to admit, on the part of the defendant, that this document had been produced for Sir John Trevelyan before the arbitrator on the reference. It does not appear from the report that any objection was taken before the Master of the Rolls to this evidence. The document was produced upon the arbitration, and it must of course have been seen on that occasion by Thomas Charter. It is not suggested that any objection was made by him as to its accuracy. It is equivalent to an assertion, in Thomas Charter's presence, that he had stated James Charter to be the purchaser; and as such it is, I think, admissible.

The circumstances to which I have adverted lead me to the conclusion that at the time of the reference, viz., in the year 1808, Sir John Trevelyan was unacquainted
 * 736 * with the fact that James Charter was not the purchaser.

On the motion for leave to file a bill of review, a document was produced in the handwriting of Thomas Malet Charter, who was clerk to his father, and which was stated to contain the original answer by Thomas Charter to the queries of Mr. Boucher; and from the handwriting of Boucher upon it, it is clear that it must have been seen by him. In this document Mr. Charter's name is interlined by Boucher, as the purchaser. But that is not, I think, inconsistent with Mr. James Charter being the person meant, and with his having accordingly

so described him, with the addition of "Exeter," when he made out the paper produced before the arbitrator.

Reference was made to certain entries in Bryant's Diary, for the purpose of repelling the inference to be drawn from this evidence. That book was seen and inspected by Boucher, but it was examined for a particular purpose; and even if the entries had been more distinct than they appear to be, I cannot assume that they would have arrested that gentleman's attention.

The item under date June, 1788, in the list of claims and demands, if it stood alone, might lead to the inference that Sir John Trevelyan considered Thomas Charter as the purchaser; but it is, I think, without any strained interpretation, reconcilable with the evidence relied upon by the appellants; and upon this part of the case the balance of evidence is, I think, strongly in his favour.

The next question relates to the value. The reversions, together with the $13\frac{1}{2}$ acres, the manor-house, and the manorial rights, were included in the portion of the estate purchased by Thomas Charter for 1627*l*. * This * 737 was far below Mr. Kingdon's estimate. The estimate remained in the possession of Thomas Charter. The value of the whole property was stated by Kingdon to be, as to the demesnes, 13,184*l*.; as to the reversions, 4790*l*. The $13\frac{1}{2}$ acres demesne excepted from the purchase by the trustees, were valued at 476*l*. 5*s*.; and the demesnes sold off before the sale to the trustees, were estimated by Kingdon at 452*l*. 10*s*. The manor-house with the appurtenances was included in the valuation of the demesnes, and is estimated by the witnesses at 420*l*. These three sums deducted from 13,184*l*., Kingdon's valuation of the demesnes, leave a balance of 11,835*l*. 5*s*. for the demesnes purchased by Sir Thomas Acland's trustees, and which were purchased for 12,026*l*. 15*s*. The demesnes therefore sold for something more than their estimated value.

Then as to the reversions; they were valued at 4790*l*. 13*s*. A part had been sold; that portion was sold for 1284*l*., — a little more than the valuations. The residue purchased by Thomas Charter, in his cousin's name, would, according to

the same valuation, be worth 3506*l.* 13*s.* But in addition to the reversions, there were the 13½ acres of land, valued at 476*l.* 5*s.*; and the manor-house and appurtenances, valued at 420*l.*; making altogether 896*l.* 5*s.*, which, added to the value of the unsold reversions, amounts to 4402*l.* 18*s.* This property he purchased for the sum of 1626*l.* 5*s.*, being not much more than a third of the sum at which it had been valued by Mr. Kingdon, — an undervalue so great as to admit, I think, of only one explanation; viz., that finding Sir John Trevelyan was willing to sell the whole property for 18,000 guineas, and

that Sir Thomas Acland's trustees were willing to pay
 * 738 for * their part the sum of 12,023*l.* 15*s.*, he availed himself of the opportunity of getting the residue for the sum required to make up the 18,000 guineas, without regard to the actual value, thinking that Sir John Trevelyan would be satisfied with realizing that sum, and would not inquire into the details.

An attempt was made to show that the sum paid was the full value. But for this purpose the interest was taken at five per cent, and a reduction made of one-third from the result of the calculation; and in this way the value of the reversions was attempted to be reduced from 3506*l.* 13*s.* to between 700*l.* and 800*l.* But in the whole of this transaction, Thomas Charter relied upon Kingdon's judgment; he consulted Kingdon as to the value of the 13½ acres, the excepted desmesnes. Kingdon lived in that part of the county, and was obviously well acquainted with the value of this description of property, which was common in that district; it is by reference, therefore, to his valuation that the fraudulent nature of the transaction must be decided. It is to be observed that in estimating the value of the property purchased at 4402*l.* 18*s.* nothing has been taken for the value of the manorial rights.

To the claim as to Axmouth Marsh, no satisfactory answer has been given. It seems to have been retained as a part of the property purchased, although not included in the sale.

The result, then, to which I think the evidence tends is, that the property was purchased by Thomas Charter, in the name of James Charter, at the time when Thomas Charter was acting as agent to Sir John Trevelyan, and employed by

him to dispose of it; that Sir John Trevelyan was not informed at the time of the true nature of this transaction; that the * purchase-money paid was greatly * 739 below the value; that it was studiously concealed from Sir John Trevelyan at the time of the reference in 1808; that Thomas Charter had been the purchaser, and that this appears to have been discovered only in consequence of the application made on the part of Thomas Malet Charter to Mr. White, in the year 1825.

Under these circumstances, time cannot be set up as a bar to the suit, which in other respects rests upon the clearest principle of equity. I recommend to your Lordships, therefore, to affirm the decree with costs.

With respect to the petition for leave to file a bill of review, I have, in considering the evidence in the suit, sufficiently expressed my opinion that the newly discovered evidence ought not, if it had been produced at the hearing, to have led to a different result; and the appeal from the order dismissing the petition ought, therefore, to be dismissed, and this also with costs.

LORD COTTENHAM. — My Lords, I shall not enter into the facts of this case. The opinion which I have formed upon it is known from the report of the case when it was heard before me. I have very carefully attended to the arguments at the bar, bringing under review the grounds on which that judgment proceeded; and I have not found any reason to alter the opinion I then expressed. (a)

LORD CAMPBELL. — My Lords, I have attended most anxiously to this case, and I am sorry to be obliged to arrive at the same conclusion as my noble and learned friends. It is impossible not to feel most * deeply for the family * 740 of Thomas Charter. It may be said almost that he sins in his grave; for by frauds which he committed in his lifetime his family is now brought into a state of great affliction. But upon the principles which have guided Courts of

(a) See 4 Law Jour. 209, New Series.

Equity on such occasions, I think it is impossible to do otherwise than to sustain this decree. The *onus* lay in this case on the appellants clearly to prove that the transaction was fair.¹ I think that that has not been supported, but, on the contrary, I think there is direct evidence the other way.

The only doubt which I have had has been with regard to the lapse of time and acquiescence, and certainly it is of the last importance that there should be a limitation to inquiries of this sort; but for the reasons which have been stated so very lucidly by my noble and learned friend, the Lord Chancellor, I am obliged to come to the conclusion that the remedy in this case is not barred by lapse of time, and that the parties have never, with a knowledge of the facts, done any thing which can be considered as an acquiescence in the matter complained of.² I therefore must conclude in the words used by my noble and learned friend (Lord COTTENHAM), when Master of the Rolls; and I think it is impossible that any language can more clearly or strongly express what is the just result of this case. He says: (a) "It does indeed become the duty of the Court, when transactions of long standing are brought before it, most anxiously to weigh all the circumstances of the case, and to consider what evidence there may have been which, from lapse of time, may be lost.

But beyond this, in cases of fraud, I think time has no * 741 effect. Were it * otherwise, the jurisdiction of the

Court would be defeated, not because the case was not one for its interference, but because the author of the fraud had been enabled to continue his deception till such a time had elapsed as to prevent the interference of the Court. Such fortunately is not the law; and those who may be disposed fraudulently to appropriate to themselves the property of others may be assured that no time will secure them

(a) Law Jour. vol. 4, New Series, Chancery, p. 214.

¹ See *Austin v. Chambers*, 6 Cl. & Fin. 2, note (3).

² See *De Montmorency v. Devereux*, 7 Cl. & Fin. 188, note (1) and cases cited; *Stump v. Gaby*, 2 De G., M. & G. (Am. ed.) 623, note (1); *Skottowe v. Williams*, 3 De G., F. & J. 635; *Life Association of Scotland v. Siddal*, 3 De G., F. & J. 74; 1 Sugden V. & P. (8th Am. ed.) 252, 253, and cases cited in notes.

in the enjoyment of their plunder, but that their children's children will be compelled by this Court to restore it to those from whom it had been fraudulently abstracted."

[It was ordered and adjudged that the appeal be dismissed, and that the said decrees and orders be affirmed; and also that the appellants do pay to the respondents their costs in the appeal.]

* THE EARL OF ROSSLYN v. AYTOUN. * 742

1842.

EARL OF ROSSLYN and JOHN DUNDAS, Esq. *Appellants.*
 ROGER AYTOUN, Esq. *Respondent.*

Public Office. Appointment. Statute; Construction of.

An appointment to an office for the life of the appointee is not invalid upon the sole ground that the person making the appointment only holds his own office for life.

The Director of Chancery in Scotland could not, before the passing of the 57 Geo. 3, c. 64, appoint two persons jointly to be Clerk of Chancery for their lives and the life of the survivor of them.

The holder of an office enjoyed the right of appointing a sub-officer; the 57 Geo. 3, c. 64, passed to regulate this and other offices, enacted, that "upon the termination respectively of the present existing interests in the undermentioned offices" (mentioning the office and the sub-office), "and so soon as the said offices shall become vacant," the regulation of them shall be vested in the Lords of the Treasury. After the passing of the Act, the sub-officer died, and the officer appointed another person, and died.

Held, that on his death the sub-office became vacant; for the words "existing interests," in the statute, did not mean the right of the holder of one office to appoint to another.

July 19, 21; August 4, 8, 1842. September 4, 1844.

In this case the respondent had instituted in the Court of Session an action of reduction and declarator against the

appellants, for the purpose of reducing an appointment held by the appellants jointly as clerk of the Chancery in Scotland. The Chancery is an office of record in Scotland, the whole business of which is placed under the superintendence of the director of the Chancery, to whom is committed the custody of the quarter seal, and who is empowered by his commission to appoint a deputy and also a clerk of Chancery. On the 17th January, 1780, the Earl of Rosslyn was appointed director of the Chancery: in 1787 he appointed Mr. Bethune clerk of the Chancery. That gentleman held the office till 1807, when he died, and Mr. John Erskine * 743 kine * was appointed. In 1817 Mr. Erskine died, and was succeeded by Mr. Ralph James Dundas, who died in 1824. In the year 1817, the Statute 57 Geo. 3, c. 64, was passed, intitled "An Act to abolish certain Offices, and regulate others, in Scotland." By the 11th section of that statute it was enacted, "That from and after and upon the termination respectively of the present existing interests in the undermentioned offices, *videlicet*" (among others), "the office of director of the Chancery in Scotland, the office of clerk of the Chancery in Scotland, and so soon as the said offices, or any or either of them, shall become vacant, the duties thereof shall be performed by the person appointed to hold the same in person; and from time to time as any of the said respective offices shall become vacant, it shall be lawful for the Lord High Treasurer, or the Commissioners of the Treasury, to regulate the duties and establishments of the said offices respectively, as they respectively become vacant, so as that the several duties to be discharged therein respectively shall be performed in person. And thereupon and thereafter such and such number of fit and proper persons shall be appointed as may be sufficient and necessary to execute the duties to be done, performed, and executed in the said offices respectively as the said commissioners shall deem fit, with such salaries or allowances as shall be ordered and appointed by the said Lord High Treasurer or Commissioners of the Treasury in that behalf, regard being had in every such case to the nature and extent of the duties to be performed, and to the responsibility which may attach or

belong to the several and respective offices or persons executing the duties of the said offices respectively. And all such regulations, appointments, salaries, and allowances, when so made and established, shall become and be in full * force in relation to the said offices respectively, any * 744 thing contained in any Act of Parliament, or any law, usage, custom, or practice, to the contrary notwithstanding."

In 1824 the Earl of Rosslyn appointed his youngest son, Mr. Henry Francis St. Clair Erskine, and Mr. John Dundas, to the office "jointly and severally for their lives and the life of the survivor of them." Mr. H. F. St. Clair Erskine died in 1829, and in July, 1830, the earl appointed his eldest son, Lord Loughborough, and Mr. John Dundas, to the office "jointly and severally during their respective lives and the life of the survivor of them, with full power to them jointly and severally and to the survivor of them, by themselves or the survivor of them, to employ an assistant or assistants, for whom they shall be answerable to me or my deputy, &c.; enjoying and exercising the said office of writers and clerks or writer and clerk of the said Chancery during their joint lives and the life of the survivor of them, with all the privileges, &c., hitherto known to belong to the said office."

In January, 1837, the Earl of Rosslyn died, and by a Treasury minute, dated on the 11th April in that year, and made under the authority of the statute, it was ordered that the law offices of director of Chancery and clerk in Chancery should be held by one person and be remunerated by one salary; and letters-patent were afterwards passed for granting to Roger Aytoun, Esq., the said office. This appointment was protested against by the present appellants, who continued to act as joint-clerk, and to receive the fees and emoluments accordingly. The respondent therefore instituted a suit to reduce the appointment under which the appellants claimed to hold the office, and to have it declared that he was * entitled to the same. The * 745 cause was heard before the lords of the first division of the Court of Session, who, having consulted the other Judges thereon, decreed, in the terms of the summons, that the appointment of the appellants became and was void from

the period of the death of the Earl of Rosslyn, in January, 1837.

There had been a division of opinion in the Court of Session: Lords COCKBURN, JEFFREY, IVORY, CUNNINGHAM, MURRAY, and FULLARTON thought that the Earl of Rosslyn had no power at common law to make an appointment for the life of the appointee; Lord MACKENZIE thought that the earl had no power by the common law to make such an appointment, but that if he had possessed it by the common law, the statute would not have deprived him of it; while Lord MONCRIEFF, declaring that the earl had such a power by the common law, expressed his opinion that the statute took it away from him. The Lord President and Lord Justice Clerk, and Lords MEDWYN, MEADOWBANK, and GILLIES, were of opinion that the usage clearly proved by the evidence in the case to have existed in other great law offices to make appointments of this nature, showed that the Earl of Rosslyn could make such an appointment under the common law, and they were of opinion that his right to do so was not affected by the statute. Judgment having been given for the pursuer (the respondent), the case was brought by appeal to this House.

The Attorney-General (Sir F. Pollock), for the appellants. — The question here mainly depends on the 57 Geo. 3, c. 64, § 11. The Judges in the Court below were not unanimous, and those who formed the majority did not agree together in their reasons, nor even in their views of the question as affected by the common law and the provisions * 746 of the statute. This circumstance * renders the task of impeaching the judgment one of less difficulty than usual. There can be no doubt that by long-established usage the director of the Chancery in Scotland has a right to make the appointment of the clerk of the Chancery not only for his own life but for the life of his nominee; *Waddell v. Inglis*; (a) where a conjoint appointment for life to the office of deputy-clerk, made by one

(a) *Morr.* 13134.

principal, was sustained against a succeeding principal, though the principal for the time being was liable for the acts of the deputy. That decision was affirmed in this House. (a) As to this particular appointment, it is free from objection in point of form, as well as in point of principle and practice. It appears that in one instance a person named Brown was appointed to the office ; he was turned out ; a fact which it is contended shows that his appointment could not be for life : but that is an error, for in what is called a life appointment the law authorizes a removal for cause. In the absence of proof to the contrary, it must be assumed that his removal was for cause ; and at all events, if he was appointed only during pleasure, and was then removed, that would not show that the director could not appoint for life. In like manner, the objection that the appointment being for the life of the appointee, the person making the appointment is only in for his own life, and cannot therefore appoint except for his own life, cannot be sustained.

[THE LORD CHANCELLOR. — There is nothing in that objection.]

LORD CAMPBELL. — The clerk is not the deputy of the director ; he is altogether a different officer : the clerk in the Queen's Bench is appointed for life by the chief clerk, who holds for his own life only.

LORD BROUGHAM. — Until the Act 3 & 4 Will. 4, * c. 94, the Master in Chancery was appointed by the * 747 Lord Chancellor for life ; yet the Lord Chancellor himself held during pleasure only.]

That matter is familiar to English lawyers, but seems to have been doubted in Scotland : yet even there the authorities are in favour of such a course. In the case of *Hogg v. Kerr*, (b) the Court treated an office of this kind as held for

(a) Collection of Appeal Cases in 1770 and 1771.

(b) *Morr.* 13106.

life, and refused to remove the appointee, but confirmed him in his office. It may therefore be assumed, that but for the statute the appointment is valid.

Then the question arises, how far it is affected by the statute? All "existing interests" are preserved by that statute. Whatever right, therefore, was possessed by the Earl of Rosslyn, or had been created by him before the passing of the statute, was at the time of its passing an "existing interest," and was preserved. If it is required to ascertain the intentions of the legislature on this point, other Acts of a similar kind may be referred to. The 6 Geo. 4, c. 82, was a reforming statute passed to regulate public offices. That statute deprived persons holding certain offices of rights which had previously belonged to those offices: it put an end, for instance, to the sale of offices; and it required that every officer should in future discharge the duties of his office in person; and it destroyed sinecures. But though making these great and extensive reforms, the legislature either preserved existing interests or compensated the possessors of them. The meaning of the word "interest" is extensive enough when applied to an office; it must mean something beyond the mere occurrence of a vacancy; and that it does so the legislature has shown, by adding the words, "and so soon as such office shall become

* 748 vacant:" * till it does become vacant the interest continues. And this must certainly be so with respect to offices the exercise of the patronage of which was salable. Now the office of clerk of Chancery was a salable office, and it did not become vacant by the death of the director of Chancery. The two offices are distinct; one officer is not the mere deputy of the other, depending for the continuance of his authority on the life of his principal. The clerk of Chancery is an officer specially named in the Act of Parliament; and when that Act spoke of preserving existing interests, it must be taken as referring to the existing interests of the holder of the office of clerk of Chancery, as well as to those of any other officer. He had an existing interest after the death of the director of Chancery; for his own appointment was for his own life, and it may now be assumed that

such an appointment was entirely within the power of the director of Chancery to make. The majority of the Judges in the Court below founded their judgment entirely on the want of power in the director to make such an appointment; and as that ground for their decision is taken away, the decision itself cannot be supported.

Mr. Pemberton and *Mr. Aytoun*, for the respondent. — Lord Rosslyn had no power to make the grant now in question. The Statute of 57 Geo. 3, c. 64, deprived him of any right of that sort which he might before have possessed. But he never had any such right. The appointment cannot subsist after the death of Lord Rosslyn. First, he had no right to make any grant which was to enure beyond his own life; secondly, he had no right to appoint two persons to this office with the benefit of survivorship; and lastly, whatever rights he might have had before the statute * of 1817, * 749 he had none after the passing of that statute. It is not pretended that, as a general rule, the holder of an office for life, or even for pleasure, has no power to appoint another officer beyond his own life. He may do so, but he cannot appoint a deputy to discharge the duties of his own office for more than his own life. The rule as to official appointments is fully and distinctly stated in *Norton v. Simmes*. (a)

If a man has an office which he may exercise by agent or deputy, the latter cannot have a greater authority than is possessed by the principal, and must at any time be removable by the principal, even though the principal has granted the office in terms which declare him to be irremovable. The directions to this officer, in the various commissions granting the office, are, that he is only permitted to use the labours of deputies in such way as he may find necessary, which proves that rule to be applicable here. The nature of this office is clearly that of substitute or deputy for the principal. The substantial duty of this officer is to make out the writs, and to authenticate them by his signature. The earliest commission put in evidence, which was issued in 1611, did not

(a) Hob. 13.

contemplate the discharge of his duties by deputy. The commission of 1625 was that which first authorized the director to appoint "a substitute or deputy." Now a deputy cannot have an interest in an office beyond the life of his principal. The next commission was in 1628, and that again mentioned that the officer might enjoy the office by himself or his deputy, whom he might appoint for such time as he should think fit, and for whom he should be responsible. The

next grant was in 1634, mentioning deputies in the
* 750 same way. The * next commission was in 1651, and

the terms then used are nearly the same as in the others. The next was in 1683: that was a joint commission to Stuart and Kerr, to hold jointly and for the life of the survivor; and then for the first time clerks or servants are mentioned. Here each was to enjoy the office turn and turn about for three months, to appoint his own deputies and clerks, and each was to be answerable for his own clerks and deputies only. It is clear that at that time the deputies could have no permanent interest in the office. The next commission was in 1693, to Kerr alone, and he was to appoint and remove deputies, for whom he was to be answerable during his exercise of the office. The next commission was in 1694, and was in the same terms. All these commissions show that the power was not to appoint permanent officers, but merely authorized the director to appoint clerks to assist him. Up to that time the commission to the director himself had only been "during pleasure." In 1704 the commission extended the grant from "our pleasure," to the life of the grantee. In 1722 the commission, reciting the zeal of the Kerrs for the Hanoverian succession, granted the office to Lord Charles Kerr and his son, or the survivor, with power to intromit with all fees, &c., which had hitherto belonged to the office. That this did include the clerks' fees is plain, from the very words of the commission of 1724, which expressly declares the clerks' fees to belong to the director. The next commission was in 1756. These commissions show, first, that no deputies or servants could be appointed for any term beyond the life of the person appointing; secondly, that when clerks or servants were allowed to be appointed, they were only

to be appointed while the principal was responsible * for * 751 their conduct; thirdly, that the duties are altogether those which ought to be performed by the director, but in which he was permitted to have assistance; and fourthly, that all the dues payable in respect of the office were the dues payable to the director himself. So far, therefore, it is clear that the clerk of Chancery was the mere assistant or deputy of the director, and was never meant to be the holder of a distinct and substantive office. Then came the commissions to the deputies. The first was to Hogg in 1677, and that was granted under the authority of the commission to Kerr in 1651; and this deputy's commission was to give him one-fourth of the fees in consideration of a sum of money paid by him for the grant, and he was to take the fees for extracts and copies, &c., debarring the other clerks of the office from any right to the fees. He could not exercise any power beyond that which the commission had granted. If he had sold the office it is plain that the director could not remove him, because it was the subject of purchase. The case is reported to that effect, (a) and the director was declared not entitled to be the judge of the alleged malversation of the deputy, because the latter had purchased the office.

[LORD CAMPBELL. — That case shows that it was really an office.]

LORD BROUGHAM. — Yes, for a declarator of a Court never could have been necessary in the case of a private servant.]

Yet the clerk always appears to have been in the situation of a mere deputy or assistant of the principal.

[THE LORD CHANCELLOR. — We think that that cannot be said after the 57 Geo. 3. That Act calls it an office, and treats it as an office. We cannot ask how the legis-

(a) Morr. 13106.

* 752 lature * came to treat it in that manner ; it is enough for us that it has done so.]

The only other appointment is Smith's, in 1732. That was made under the commission of 1724, in which the clerks' fees were declared to belong to the director. Smith had a confirmation from the Crown of his grant, and consequently held a perfectly distinct office. The Crown granted him the office of clerk for life. That would have been unnecessary had the grant to him from Kerr already conferred on him the office in that way.

[LORD BROUGHAM. — That was not a grant from the Crown, but a confirmation of the original grant.]

The interference of the Crown makes his case inapplicable to the present. In 1780 Lord Rosslyn became the director ; and in 1786 Watson, who was depute-director, continued in office ; and Irving, who had been appointed by Lord Rosslyn's predecessor, continued the clerk till he died. Now it is admitted that the depute-director's office terminates with that of the principal. Watson's continuance in office must, therefore, have been mere matter of private arrangement. From all these documents it is plain that there has been no enjoyment by a deputy or a clerk as against a succeeding director ; that there was no case of a grant for life except in the case of Smith, and in his case the grant depended for its validity on the act of the Crown. The responsibility of the principal and his title to the fees also show that the grant to the deputy never could have exceeded in duration the life of the person who granted it, and who was by the very terms of his own commission liable for the conduct of his grantee. The general rule of law, therefore, has no application here, but the case must be decided by its own circumstances.

The appointment is bad, as being made to two persons * jointly. The first joint commission was issued by Lord Rosslyn, after the statute of 1817 ; but under that appointment the fees were still accounted for to John Dundas till 1831. If that had been an office for life,

John Dundas would still have held the office; he never did resign it, but in 1830, after the death of Henry Erskine, there was a fresh appointment, which recited that the office was then vacant. The Earl of Rosslyn has himself therefore treated this joint appointment as coming to an end by the death of one appointee. This was done though there had not been any formal resignation by the survivor of the two joint appointees: nothing can be more conclusive than this fact. The case of *Waddell v. Inglis* (a) is no authority here. The question supposed on the other side to have been raised in that case never was raised at all. The commission by the principals was an appointment by two persons; they concurred in an appointment, but afterwards disputed about the removal of the person appointed: of course under such circumstances he could not be removed by one of them.

Then as to the Act of 57 Geo. 3; at that time the two persons nominally holding the office were trustees for Lord Rosslyn. The whole question on the statute turns on this, whether "existing interests" mean the interests of the holders of offices, or the right of patronage. If these words require the latter meaning, there never could be a time when those interests would terminate. The same language is used in the statute with regard to this and to other offices, and in all of them it has been applied to the ceasing of the interests of the then holders of offices. If "existing interests" received *such a construction as to them, it * 754 must receive the same construction as to the office now under the consideration of the House. Lord Rosslyn's own conduct as to this office justifies this construction, for he himself treated the joint appointment as at an end when one of the appointees died. To give any other meaning to the words of the Act will be to defeat its object, and to contribute to prevent those improvements in the administration of justice which it was the purpose of the legislature to secure.

The Solicitor-General (Sir W. Follett), in reply. — The question of the joint appointment was not argued in the Court

(a) Morr. 13134; Coll. of Appeal Cases in 1770 and 1771.

below; the only point there considered was as to the effect of the death of Lord Rosslyn, which it was contended vacated the appointment. There is no valid objection to the appointment on the ground that it was made to two persons, or the survivor of them. Such an appointment was, no doubt, often made with respect to this office, as it unquestionably was with respect to others in Scotland, though the want of a register of the commissions of this particular office prevents the appellants from giving evidence of that fact. Mr. Dundas and Mr. Erskine were appointed together. Mr. Dundas and Lord Rosslyn survived Mr. Erskine; the appointment of Mr. Dundas must be deemed to have remained good after the death of Mr. Erskine and during the life of the person who made it; and as to Lord Rosslyn's then making a new appointment, there can be no doubt that Mr. Dundas's was then voluntarily surrendered and immediately renewed. In substance, therefore, there is nothing to impeach that appointment, nor is there in point of form. All the precedents relating to other offices show that there have constantly been appointments * 755 of this sort. The usage, which, if it does not make the law, at least shows what it is and what it has been considered to be, is in favour of this appointment.

September 4, 1844.

LORD CAMPBELL. — I am of opinion that this judgment ought to be affirmed. I entertain, however, no doubt of there being a separate independent office of clerk of the Chancery, though the existence of such an office does not appear from the commissions to the director of Chancery, and though the express power given to him to appoint deputies and servants in his office, for whom he shall be answerable, must rather be taken to apply to the duties of the office of director than to the duties of the office of clerk. The latter office, like others of the same sort, probably took its origin from the appointment of an assistant to do part of the duties, the principal gradually becoming a sinecurist, and the substitute exacting a fee for his own trouble in addition to those collected for the principal. But as early as the year 1677 there had grown up the office of the clerk of the Chan-

cery, to which Wm. Hogg was appointed "during all the days of his lifetime, with all fees pertaining thereto, sicklike as any of his predecessors has brinked and joyseed the same."

As to this point the statute libelled on is quite conclusive, for it recites the office of clerk of the Chancery as an office to be regulated in the same manner as the office of director of the Chancery; and therefore we are not at liberty to consider the person appointed to act as clerk as a mere agent of the director, and necessarily ceasing to have any interest or authority at the death of the director.

We have next to inquire as to the tenure of the * office, and I am of opinion that the director had the * 756 power of granting it during the life of the grantee.

There is not the slightest foundation for the argument, either on principle or analogy, that the director holding for life could not confer an interest in the subordinate office beyond his own life. Many instances might be enumerated of a person holding an office only during pleasure, being able, in point of law, to grant a freehold in another office. We have to look to the manner in which this office of clerk of the Chancery has been granted and enjoyed; and the precedents of appointments to it for life, with possession under these appointments and judicial recognition of their validity, are, in my opinion, abundant evidence to show that the director, before the passing of the Act 57 Geo. 3, c. 64, had authority to appoint a person to the office of clerk of Chancery for life; and that the person so appointed would have been entitled to hold the office after the death of the person who appointed him.

Nevertheless, I am of opinion that the appointment by the late Earl of Rosslyn, bearing date 29 July, 1830, of James Alexander Lord Loughborough, and John Dundas, and the survivors of them, to be clerks of Chancery, was *ultra vires*, and is now subject to reduction. In the first place, I concur with the opinion of Lord MONCRIEFF, that after the passing of the Act 57 Geo. 3, c. 64, a vacancy having happened in the office of clerk of the Chancery, the right of the Treasury to regulate it accrued; and, consequently, the antecedent right of the director to appoint to it was gone. It must not now

be forgotten, that the statute treats the two offices of director and clerk as quite distinct.

[His Lordship read the words of the 11th section.]

The appellants rely altogether on the words “ upon
* 757 the termination * respectively of the present existing interest in the said office ; ” and they say that although before the appointment in question a vacancy had happened in the office of clerk, the interests existing in this office when the Act passed had not terminated. And we have to say, whether any interests in the office of clerk, which can fairly be supposed to have been in the contemplation of the legislature, continued after the passing of that Act, and after the death of the Earl of Rosslyn.

It is plain that, at least, the appellants had no interest in the office when the Act passed. It was then held by James Dundas, who afterwards died, and both the appellants have been subsequently appointed. Looking to the object and language of the statute, I cannot bring my mind to think that the right of appointing to the office was an interest in the office, which was to prevent the power of regulating it, after successive vacancies, during the lifetime of the then director, and until after the death of a young man of twenty-one, whom on his death-bed he might appoint to the office of clerk. This was an office which the legislature thought to require regulation as soon as possible, for the public good. I cannot think that the right of the holder of one office to appoint to another was an interest in the latter office which the legislature intended should delay the correction of the abuses which had sprung up in it.

It has been strongly urged upon us that some meaning must be given to the words “ existing interests,” and that they mean something beyond the mere occurrence of a vacancy. I think that they are abundantly satisfied by regarding the interests in the different enumerated offices, which might exist under settlements, the offices being
* 758 held in trust, which * was often the case, or which might exist by grants in reversion, which were not

uncommon. Under such circumstances, there were existing interests in the office, which were protected after a vacancy, on the resignation or death of the existing officer. But the right of patronage I cannot think to be an existing interest in an office which is to be disposed of. It might, with more plausibility, be supposed to be an interest in the office to which the patronage was annexed; but the counsel for the appellants hardly ventured so to argue it, and I conceive that, to be a bar to the regulation of the office, it must be an interest in that office which becomes vacant, and is to be regulated. But observe how the object of the legislature may be effectually defeated by the construction contended for: Suppose there were two offices, which reciprocally appointed to each other, neither could ever be regulated to the end of time, unless by a rare accident both should become vacant at the same moment. And with regard to these two offices, the clerk collecting fees for the director, and receiving a boon from him, he has an interest in the office of director, if the director has an interest in the office of clerk, and the regulation of both offices may be indefinitely postponed.

If the office of clerk had not been salable, I think there would have been no ground for saying that the patronage of it was to be preserved to the director; and I do not think that one construction of the statute is to be adopted where the office is not salable, and another where it is. In the recent Act of Parliament for abolishing the Equity jurisdiction of the Court of Exchequer, the Lord Chief Baron was deprived, without compensation, of the valuable patronage of appointing Masters on the Equity side; and I am not

*aware of there being any thing abhorrent to reason *759 or justice in saying that, while it is for the public good that offices should exist, the holder of a particular office should have the appointment to them; but when the public good requires the abolition of these offices, they may be abolished without compensation being made for the patronage of them. Whatever hardship may be inflicted by withholding compensation in this case, if we see clearly that the right to regulate the office accrued on the death of James Dundas,

we are bound to put this construction upon it, although the value of the office of director might be thereby impaired.

But, independently of the statute, I am of opinion that the joint appointment of the appellants with benefit of survivorship was *ultra vires* of the director. This objection is distinctly made by the summons and by one of the pleas in law. It is strongly relied upon in the case of the pursuer below, and ably treated by several of the Judges. There is no ground, therefore, for the suggestion that it is a mere afterthought, resorted to when the real grounds of the action had failed. It is incumbent on the appellants to show a right to appoint two persons to the office, with benefit of survivorship, either, first, by showing that this office has been so disposed of, or, secondly, by showing that by the law of Scotland the office may be so disposed of, though never so disposed of before. But, first, no joint appointment is shown until the year 1826, after the statute, when Henry Francis St. Clair Erskine and John Dundas were appointed, during their joint lives and the life of the survivor of them. It is said, that as there is no register of the commissions to the clerks, we may presume that there were previous appointments of the same

* 760 nature. But *in the absence of a general law authorizing joint appointments, I consider it quite clear that the *onus* lies upon the appellants to prove by positive evidence that in former instances this office has been so granted and enjoyed; and the prior appointments made by the Earl of Rosslyn himself being of a single person during his own life, we are bound to believe that till the year 1824 there had been no joint appointment.

Then, secondly, the question arises whether, by the general law of Scotland, such an office, though hitherto granted only to one person for his own life, may be lawfully granted to two and the survivor of them. This would be a very extraordinary law, and it would require to be established by clear authority. There is certainly nothing resembling it in England. By usage, the very valuable office of chief clerk in the King's Bench might be, and always was, granted to two, and the survivor of them, and therefore might lawfully be so

granted ; but the office of a prothonotary in the Common Pleas and other offices, which till lately were salable in our Courts of Justice, and which had been repeatedly sold, was granted to one person during his life, and, it is quite certain, could not have been sold, as against a succeeding Chief Justice, to two, and the survivor of them.

To make out the general law in Scotland, usage with respect to other offices is relied on. The offices cited are generally of a different nature, or there are words in the commission of the principal to authorize the joint appointment. But if the offices were of the same nature, I utterly deny the inference that, because there may have been joint appointments to some, there may be joint appointments to others, though these latter have always been held by one * single individual. Could the right to appoint * 761 jointly to the office of *custos brevium* be inferred from the practice to appoint jointly to the office of chief clerk in the Court of King's Bench ? It might as well be said that this office might have been granted for the first time by Lord Rosslyn in reversion in the year 1824, because similar offices had been granted in reversion.

The authority mainly relied on to show that by the general law of Scotland such appointments are universally lawful, is *Waddell v. Inglis* ; but when properly examined, it seems to me to have no application to this case. There Inglis got an appointment for life as depute-clerk of the bills from Sir Alexander and Sir Philip Anstruther, joint clerks, and his appointment was warranted by both. Yet it was attempted by Waddell to turn out Inglis during the life of one of the Anstruthers, and an action was brought to that effect. That action was opposed by Sir Robert Anstruther (the son and representative of Sir Philip), and it was objected by Inglis that the person challenging his title had no right to remove him, being but one of two joint tenants to the clerkship. In these circumstances the House of Lords held that Waddell had no right to turn him out. The question as to the effect of Inglis being appointed jointly with another did not arise between these parties, and could not be decided. There is,

therefore, no ground for saying that this House has ever given its sanction to the doctrine contended for. In the absence of any authority in the law of Scotland, that two may be appointed to office with benefit of survivorship, to which only one had been appointed for life, we must consider

that ten might as well have been appointed with benefit of survivorship * 762 as two; and that, besides the injustice to the successors in the office in which the right of appointing is vested, there must be great danger that the duties of the office to which the appointment is made may not be adequately performed.

I most sincerely regret that the decision of the Court of Session should cause any loss or disappointment to the family of a most honourable, disinterested, and distinguished statesman, whose talents and virtues conferred great benefits on his country, and endeared him to all who had the advantage of knowing him in private life; but in the faithful discharge of my judicial duty, I feel bound to declare what is the law; and, according to the law, I think that this decision of the Court below must be affirmed.

I must observe that we cannot be influenced by the consideration that the Treasury might sooner have interposed. The rights of the public may be enforced, even if they had been for a time neglected. But in this case it is to be remembered, that till there was a vacancy in the office of director, there must have been great difficulty in regulating the office of clerk. The object seems to have been to consolidate the two offices by the appointment of one officer, who was to do the whole of the duty at an adequate fixed salary; and this could not have been sooner accomplished.

For these reasons, I move your Lordships that the interlocutors appealed against may be affirmed.

LORD BROUGHAM. — I differ entirely from the Court below in the body of its arguments, but I find one point on which the appointment cannot be supported, and I must therefore adopt the final decision of the Court. I do not think

* 763 that the power has been legally * executed: the two

lives have been put in without authority; and therefore I agree, though reluctantly, in the judgment which has been proposed for your Lordships' adoption.

THE LORD CHANCELLOR. — This case has been for a long time depending; I have frequently directed my attention to it, and I have never been able to get over the difficulty arising from the joint appointment. I therefore feel bound, though reluctantly, to support the motion of my noble and learned friend.

[The interlocutors were affirmed, but without costs; and with this affirmance the cause was remitted back to the first division of the Court of Session.]

APPENDIX.

THE SUSSEX PEERAGE.

1844.

EVIDENCE OF THE RIGHT REV. N. WISEMAN, D.D.

(SOME gentlemen having expressed a wish for Dr. Wiseman's evidence on the claim to the Sussex Peerage as to English marriages in Rome, the material passages extracted from the printed evidence are here subjoined. It was omitted in the report (*ante*, p. 117), as there stated, because the claim was disposed of on the construction of the Royal Marriage Act alone.)

“The law of the Council of Trent is that a marriage, to be valid, must be in the presence of the parish priest and two witnesses. The Council of Trent does not point out the particular form of the ceremony of marriage; the Roman ritual prescribes that. To make a marriage lawful, it would be necessary to conform to the Roman ritual, but it would be valid and binding though the forms were not observed; but the parties would be subjected to censure in the Ecclesiastical Courts for illegal proceedings. It would not be required that a marriage which had been so celebrated irregularly should be repeated: it could not be rendered more binding by any subsequent ceremony; it would be indissoluble.

“I never heard of any attempt being made by two Protestants to be married according to the Catholic ceremonial in Rome, or before the parish priest; nor do I believe that they would be permitted to avail themselves of the law. The parish priest would not be under an obligation to solemnize the marriage of two Protestants. There has been no regulation upon that subject, nor can I refer to any decree relating to it. But supposing a marriage of two Protestants, celebrated at Rome in the presence of a Protes-

tant clergyman, according to the English Protestant ritual,
 * 765 should afterwards * come before a tribunal there for a decision upon it, I have no hesitation in saying that that tribunal would pronounce for the validity of the marriage. Such persons so married, if they afterwards professed the Roman Catholic faith, would not be required to be married again, nor to do any act to confirm the marriage; nor would they be allowed to separate, nor could either of them marry again during the life of the other. The children of such a marriage would be deemed legitimate. I believe that such a marriage would not subject the parties to any ecclesiastical censure. My decided opinion is, that if parties were married according to the forms which they considered, in accordance with their religious opinions, binding upon them as a matrimonial contract, the law would consider them as man and wife, and would not allow a separation. If two persons married according to the form of their own religion, they would undoubtedly be held as lawfully married. If the parties themselves considered the marriage sufficient, and if in the opinion of persons of character, of their own country and religion, it was considered equivalent to a marriage, — as if two Scotch persons married according to the law of their country, — it would, on that basis, be considered sufficient and binding.

“The decree of the Council of Trent, declaring void all marriages which are not celebrated *coram parochio* and two witnesses, is not binding in any country in which that decree has not been duly promulgated, but there the old canon law still prevails as to the marriages of Catholics. The decree in its terms makes no distinction between Roman Catholics and Protestants, but practically it does not extend beyond the former; and its object was to do away with a great practical abuse respecting marriages among Catholics, and not in any way to strike at Protestants. That is the interpretation of the decree according to Layman’s Course of Moral Theology, — a work of the highest authority in all ecclesiastical matters, and cited in the judicial tribunals in Roman Catholic countries.”

The preceding extracts are made from Dr. Wiseman’s evidence, given before the objection was taken to his competency.
 * 766 After that objection was overruled, and he was * desired to state the grounds of, and authority for, his opinion that by the law of Rome a marriage of two Protestants celebrated as before described, would be held valid there, he proceeded thus:—

“I consider this case as a practical case: Supposing the case of a marriage, such as has been stated, came before the Roman tribunals, and it had to be decided whether for all civil purposes it was to be held good or not, the decision would be that they were to be considered as married, and the children would inherit. This is grounded upon the principle that the operation of that decree of the Council of Trent was not intended to have effect to the extent of annulling and invalidating Protestant marriages. I had just alluded to the decree, when the question of my admissibility as a witness was introduced; but I had observed that this decree is under the peculiar condition of not coming into operation until thirty days after it is promulgated in each parish, and from that moment forward we find the opinion of theologians to have been, and decisions framed in conformity with that opinion, that in cases where Protestants married according to their own form, even in places where the Council of Trent was promulgated, those marriages were valid. It is true that in the decision of such cases there have been discrepancies, and that the decisions at Rome have varied, sometimes being given for the marriage and sometimes against it; and irregularities, in consequence of that difference of opinion, have arisen. Pope Benedict XIV. has entered at great length into the question, and the grounds upon which it was decided. He issued a bull, addressed to the bishops of Belgium, in which he pronounced marriages between Protestants in Belgium, though the Council of Trent had been there promulgated, to be valid. This bull, which goes at length into the question, is not a remedial one. It is not saying that they shall be considered as valid, and shall be valid *in futuro*; but it declares that they have all along been valid, notwithstanding the promulgation of the Council of Trent in those places; and he gives, in the recitals of the bull, the reasons of the decision; reasons which apply to any other similar case. He gives a variety of reasons, which it is not necessary to * enter into; but I may mention the principal, * 767 and those which he dwells upon most. First, that it could not be the intention of the Council of Trent to bind Protestants in any way, from the very fact of their having given thirty days to elapse between the promulgation and the operation of the decree, which could only be in order to enable Protestant powers to prohibit the execution of the decree; because, he says, it could not be expected that Protestants would go before a Catholic priest to be married: and, he says, if we admit, in the present case, those mar-

riages to be invalid, we introduce the very evil which it was the intention of the Council to avoid, and we shall make the decrees of the Council a subject of dislike to Protestants, which it evidently was the object of the Council by that decree to avoid. Then he observes that it would be contrary to the spirit of the Council to interfere in that way, inasmuch as it would produce a serious evil to the Catholic religion, which the Council themselves wished to avoid; which was that of fictitious conformity or fictitious conversion, for the purpose of getting rid of matrimonial arrangements; and he alludes to the danger there would be of persons that wished to become Catholics being prevented by the fear of having to be considered as having lived until then in a state of concubinage. Those evils are such that he cannot suppose the Council to have intended to produce them; and, therefore, he interprets the decree of the Council in such a way as not to invalidate the marriages of Protestants."

[648]

INDEX.

ABATEMENT, PLEA IN.

A plea in abatement is a dilatory plea, and must be pleaded with strict exactness. Where, therefore, defendants in an indictment in the Court of Queen's Bench in Dublin, pleaded in abatement, that the indictment was found on the evidence of witnesses who had not been sworn in Court, according to the Act 56 Geo. 3, c. 87; but did not set out in the plea the names of those witnesses, nor allege that there were no other witnesses duly sworn on whose evidence the indictment was found, nor allege that the witnesses on whose evidence it was found, were not affirmed, the plea was held bad. — *O'Connell v. The Queen*, 158.

And for the same reasons, a plea in abatement on the ground that the swearing of the witnesses had not been duly certified by the signature of the foreman or other member of the grand jury, under the 1 & 2 Vict., c. 87, was held bad. — *Id. ibid.*

ACT OF PARLIAMENT. See **RAILWAY COMPANY.**

ANNUITIES. See **PRIORITY.**

APPEAL. See **COSTS. PRACTICE**, 14.

APPOINTMENT. See **OFFICE.**

ARRAY. See **CHALLENGE OF JURY.**

ASSIZE. See **PRACTICE**, 5.

ATTORNEY AND SOLICITOR. See **SOLICITOR AND CLIENT.**

BILL OF LADING.

A carrier by sea, under a bill of lading of goods "to be delivered in the like good order and condition at the aforesaid port of, &c., all and every the dangers of the seas, &c., excepted, unto Mr. ——— or assigns, on paying for the said goods freight and charges as per margin, with primage and average accustomed," is not entitled immediately on the arrival of the vessel, and without notice to the owner, to land the goods; *and *769 if he should land them, and they should be destroyed, he will be answerable to the owner for the loss. — *Bourne v. Gatliff*, 45.

BILL OF REVIEW. See **PRACTICE.**

BISHOP.

A Roman Catholic bishop, holding the office of coadjutor to a vicar-apostolic in this country, is, in virtue of that office, to be con-

sidered as a person skilled in the matrimonial law of Rome, and therefore admissible as a witness to prove that law. — *Sussex Peerage Case*, 85.

BROKER.

In case, the declaration alleged that A. employed B. as a broker, to sell and deliver oil, on the terms contained in such contracts of sale as should be made with persons who should become purchasers thereof, for reasonable commission to B. : that B. accepted the employment, and sold oil to C. on the terms of payment on delivery : that it thereupon became the duty of B. not to deliver the oil without payment : that B. delivered the oil to C., but did not obtain payment, whereby the plaintiff was damnified.

Held, that the duty of B. arose out of the contract ; that this declaration, therefore, set forth a good cause of action ; and that, after verdict, judgment could not be arrested. — *Brown v. Boorman*, 1.

CARRIER.

1. A carrier by sea, under a bill of lading of goods " to be delivered in the like good order, &c., at the port of, &c., unto Mr. ——— or assigns, on paying for the said goods freight and charges as per margin, with primage and average accustomed," is not entitled immediately on the arrival of the vessel, and without notice to the owner, to land the goods ; and if he should land them, and they should be destroyed, he will be answerable to the owner for the loss. — *Bourne v. Gatliff*, 45.

2. In a declaration against carriers, one of the counts averred the contract to be to carry goods from D. to L., and to take care of them on landing them at a wharf there, and to deliver them to the plaintiff ; the defendants pleaded that they did take care of the goods at the wharf till they were destroyed by fire, without defendants' default.

Held, a good plea to the count. — *Id. ibid.*

* 770 * CASE. See PLEADING.

CHALLENGE OF JURY. See JURY.

A challenge to the array in the Court of Queen's Bench in Dublin, alleged that the jurors' book had not been completed in conformity with the requisites of the Act 8 & 4 Will. 4, c. 9 ; that the names of fifty-nine persons, duly qualified to serve on juries, had been fraudulently omitted from the general list from which the book was made up, and from the book itself, for the purpose of prejudicing the defendants : but the challenge did not contain any specific accusation against the sheriff or other returning officer concerned in preparing the list.

Quære. Whether the causes of challenge to the array, thus alleged, were sufficient? Per Lord DENMAN : They were sufficient. — *O'Connell v. The Queen*, 158.

The right of a defendant to a peremptory challenge of jurors to the number of twenty, exists in all cases of felony, and is not confined to those which are punishable capitally.

The law is, in this respect, the same in Ireland as in England. — *Gray v. The Queen*, 427.

CHANCERY IN SCOTLAND.

The director of Chancery in Scotland could not, before the passing of the 57 Geo. 3, c. 64, appoint two persons jointly to be clerk of chancery for their lives and the life of the survivor of them. — *Earl of Rosslyn v. Aytoun*, 742.

CONTINUANCE AND DISCONTINUANCE.

The Court of Queen's Bench in Dublin, in Hilary Term, made an order for a trial at bar in that term ; and another order declaring that, in case the trial should not terminate before the end of the term, the next and every succeeding day until the first day of the following term, or so many days as should be necessary, should be appointed for the continuation of such trial ; and that every day so appointed should be deemed a part of Hilary Term.

Held, that this order was properly made under the authority of the 1 & 2 Will. 4, c. 31, § 3; and had the effect of duly continuing the trial during the days appointed. — *O'Connell v. The Queen*, 156.

After that order, which was entered on the record, a continuance was entered from the day in vacation on which the verdict was found, until the following term.

Held, that there was no discontinuance. — *Id. ibid.*

* CONTRACT. See PLEADING.

* 771

Evidence of former transactions between the same parties can be received for the purpose of explaining the meaning of the terms used in their written contract. — *Bourne v. Gatliff*, 45.

COSTS. See PRACTICE, 1, 2, 13.

A declaration consisted of two counts. The defendants pleaded six pleas ; four to the first, and two to the second count ; all the pleas tendering issues of fact. The plaintiff demurred specially to the third and fourth pleas, and generally to the sixth plea, and took issue on the others. The Court of Common Pleas gave judgment for the plaintiff on all the demurrers. The cause went down to trial on the issues, and a verdict was found for the plaintiff on the issues raised on the first count of the declaration : as to the issue on the second count, the jurors were discharged by consent. Judgment was afterwards entered for the plaintiff. On a writ of error to the Exchequer Chamber, that Court affirmed the judgment of the Common Pleas, except as to the general demurrer to the sixth plea, which plea the Exchequer Chamber declared to be a sufficient answer in law to the second count. A general order was made for the defendants to pay costs to the plaintiff, but no order was made to except,

out of these general costs, the costs of the sixth plea and the demurrer. The Exchequer Chamber awarded to the plaintiff costs under the statute, for delay in the execution of his judgment, by reason of the writ of error. On error brought in this House, —

Held, that the Court of Exchequer Chamber ought not to have awarded the costs under the statute, and ought to have excepted the costs of the sixth plea out of the general costs awarded to the plaintiff. — *Bourne v. Gatliff*, 45.

Semble, that on an appeal against a decree for mere matter of form, the House might affirm the decree in all other respects, but vary it on the point of form, and make the appellant pay the costs. — *Waters v. Groom*, 684.

A case was pending in this House ; the defendant in a similar case made an offer to the plaintiff to be bound by the decision of the House in the case pending. The plaintiff took no notice of the offer, but compelled the defendant to go on with his defence.

* 772 Judgment was given against the defendant ; * he brought an appeal to this House, and prosecuted it to a hearing after an adverse decision in the case previously pending. Judgment being given against him in his own case, he was ordered to pay the respondent's costs. — *Farrell v. Gleeson*, 702.

CRIMINAL PLEADING. See PLEADING.

CROWN COUNSEL. See PRACTICE, 4, 10, 11.

COUNTS. See PLEADING.

DECLARATIONS OF DECEASED PERSONS. See EVIDENCE.

DEVISE. See WILL.

EVIDENCE. See PRACTICE, 3.

Evidence of former transactions between the same parties can be received for the purpose of explaining the meaning of the terms used in their written contract. — *Bourne v. Gatliff*, 45.

In a claim of peerage, where the question was, whether the deceased peer had been married or not, a prayer-book found after the death of the claimant's mother, among her papers, was received, and an entry made in her handwriting, declaring the fact of the marriage, read from it, not as conclusively proving that fact, but as a declaration of it, made by one of the parties at the time. — *Sussex Peerage Case*, 85.

A will of the deceased peer, made many years before his death, declaring, and in the most solemn form, his marriage, and the legitimacy of his son (the claimant of the peerage), was proposed to be read as a declaration made by one of the parties ; but it was rejected, because the date, and certain expressions in it, showed it to have been written after a suit to annul a marriage of the deceased peer had been instituted by his father, and be-

cause there was nothing to show that that marriage was not the very marriage in question. — *Id. ibid.*

The declarations of a deceased clergyman to his son, to the effect that he had celebrated a marriage between the deceased peer and his alleged wife, are not receivable in evidence as the declarations of a deceased party made against his own * interest ; * 773 such interest not being of a pecuniary nature. — *Sussex Peerage Case*, 85.

The law does not recognize the apprehension of possible danger of a prosecution, as creating an interest which can bring these declarations within the rule in favour of their admissibility in evidence, upon the ground of their being declarations made against the interest of the party making them. — *Id. ibid.*

A professional or official witness, giving evidence as to foreign law, may refer to foreign law books to refresh his memory, or to correct or confirm his opinion ; but the law itself must be taken from his evidence. — *Id. ibid.*

“EXPORTATION.”

The words “shipped for exportation” are not necessarily restricted to an exportation to foreign countries, but may mean exportation in its widest sense ; that is, a carrying out of port. — *Stockton and Darlington Railway Company v. Barrett*, 590.

FELONY. See CHALLENGE OF JURY.

FINDING ON AN INDICTMENT. See PLEADING, 5, 6, 7, 8, 9.

FRAUD. See SOLICITOR AND CLIENT.

GRAND JURY.

The 56 Geo. 3, c. 87, is repealed by the 1 & 2 Vict. c. 87 ; and the latter Act applies to the Court of Queen’s Bench, as well as to the Courts of Assize and Quarter Sessions, in Ireland. — *O’Connell v. The Queen*, 156.

INDICTMENT. See PLEADING.

INQUISITION. See RAILWAY COMPANY.

An inquisition to assess compensation under a private Act of Parliament, must state the facts necessary to raise the jurisdiction ; but it will not be defective for not stating a fact which is necessarily implied by those that are stated. — *Taylor v. Clemson*, 610.

INTEREST. See OFFICE. WITNESS.

“INTIMIDATION.”

A count charging defendants with conspiring “to cause and procure divers subjects to meet together in large numbers for * the unlawful and seditious purpose of obtaining, by * 774 means of the intimidation to be thereby caused, and by

means of the exhibition and demonstration of great physical force at such meetings, changes in the government, laws, and constitution of the realm," is bad : first, because "intimidation" is not a technical word having a necessary meaning in a bad sense ; and, secondly, because it is not distinctly shown what species of intimidation is intended to be produced, or on whom it is intended to operate. — *O'Connell and Others v. The Queen*, 155.

IRELAND. See GRAND JURY. JURY.

JUDGMENT. See COSTS. PLEADING. PRACTICE. RECOGNIZANCES. SCIRE FACIAS.

JURY.

The right of a defendant to a peremptory challenge of jurors to the number of twenty exists in all cases of felony, and is not confined to those which are punishable capitally ; and the law is, in this respect, the same in Ireland as in England. — *Gray v. The Queen*, 427.

LIMITATION OF TIME. See SCIRE FACIAS. TITHES.

MARRIAGE. See EVIDENCE. ROYAL MARRIAGE ACT.

MODUS. See TITHES.

In a bill for tithes, the defendants set up a *modus* for outners (persons dwelling out of the parish, but holding lands within it) to pay 4d. per acre for all ancient pasture-land.

Held, that such *modus*, if proved in fact, would be good in law. — *Byron v. Cooper*, 558.

The existence of this *modus* having been established, the rector was allowed to take an issue to try whether it applied to ancient pasture-lands, which, after being meadowed or ploughed up within the time of legal memory, were reconverted to pasture. — *Id. ibid.*

NOTICE.

Where notice to a party was required in certain proceedings under a Railway Act, the want of notice was held to be waived by the fact that the party to whom it ought to have been given appeared, and made no protest on account of the want of it. — *Taylor v. Clemson*, 610.

* 775 * OFFICE.

An appointment to an office for the life of the appointee is not invalid upon the sole ground that the person making the appointment only holds his own office for life. — *Earl of Rosslyn v Aytoun*, 742.

The holder of an office enjoyed the right of appointing a sub-officer : the 57 Geo. 3, c. 64, passed to regulate this and other offices, enacted that, "upon the termination respectively of the present existing interests in the undermentioned offices" (mentioning the office and sub-office), "and so soon as the said offices shall become vacant," the regulation of them shall be vested in the Lords of the Treasury. After the passing of the Act the sub-officer died, and the officer appointed another person, and died.

Held, that on his death the sub-office became vacant ; for the words existing interests," in the statute, did not mean the right of the holder of one office to appoint to another. — *Id. ibid.*

PEERAGE. See EVIDENCE.

PLEADING.

1. Wherever there is a contract, and something is to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the party injured may recover either in tort or in contract. — *Brown v. Boorman*, 1.

2. In case, the declaration alleged that A. employed B. as a broker, to sell and deliver oil, on the terms contained in such contracts of sale as should be made with persons who should become purchasers thereof, for reasonable commission to B. : that B. accepted the employment, and sold oil to C. on the terms of payment on delivery : that it thereupon became the duty of B. not to deliver the oil without payment : that B. delivered the oil to C., but did not obtain payment, whereby the plaintiff was damnified.

Held, that the declaration set forth a good cause of action : that the duty of B. arose out of the contract ; and that, after verdict, judgment could not be arrested. — *Id. ibid.*

3. In a declaration against carriers, one of the counts averred the contract to be to carry goods from D. to L., and to take * care of them on landing at a wharf there, and to deliver * 776 them to the plaintiff ; the defendants pleaded that they did take care of the goods at the wharf till they were destroyed by fire without defendant's default.

Held, a good plea to the count. — *Bourne v. Gatliff*, 45.

4. A general judgment for the Crown, on an indictment containing several counts, one of which is bad, and where the punishment is not fixed by law, cannot be supported. — *O'Connell and Others v. The Queen*, 155.

5. A good finding on a bad count, and a bad finding on a good count, stand on the same footing ; both being nullities. — *Id. ibid.*

6. Where a count in an indictment contains only one charge against several defendants, the jury cannot find any one of the defendants guilty of more than one charge. — *Id. ibid.*

7. Where, therefore, a count in an indictment charged several defendants with conspiring together to do several illegal acts, and the jury found one of them guilty of conspiring with some of the defendants to do one of the acts, and guilty of conspiring with others of the defendants to do another of the acts, such finding is bad, as amounting to a finding that one defendant was guilty of two conspiracies, though the count charged only one. — *Id. ibid.*

8. An indictment against different defendants consisted of several counts charging them with various illegal acts. Some of the counts were bad, and on some of the good counts there were bad findings. The judgment against each of the defendants was stated to be in respect of "his offences aforesaid."

Held, that each count must be considered as charging a separate offence, and that the expression "his offences aforesaid" must be treated as extending to all the offences of which each defendant had been found guilty; and as some of the counts and some of the findings were bad, such judgment could not be supported. — *Id. ibid.*

* 777 9. Upon a count in an indictment against eight defendants, charging one conspiracy to effect certain objects, a finding that three of the defendants are guilty generally, that four of them are guilty of conspiring to effect some, and not guilty as to the residue of these objects, is bad in law, and *repugnant; inasmuch as the finding that the three were guilty, was a finding that they were guilty of conspiring with the other five to effect all the objects of the conspiracy; whereas, by the same finding, it appears that the other five were guilty of conspiracy to effect only some of those objects. — *Id. ibid.*

10. A count charging defendants with conspiring "to cause and procure divers subjects to meet together in large numbers for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such meetings, changes in the government, laws, and constitution of the realm," is bad: first, because "intimidation" is not a technical word having a necessary meaning in a bad sense; and, secondly, because it is not distinctly shown what species of intimidation is intended to be produced, or on whom it is intended to operate. — *Id. ibid.*

11. A plea in abatement is a dilatory plea, and must be pleaded with strict exactness. Where, therefore, defendants in an indictment in the Court of Queen's Bench in Dublin, pleaded in abatement, that the indictment was found on the evidence of witnesses who had not been sworn in open Court, according to the Act 5 & 6 Geo. 3, c. 87; but did not set out in the plea the names of those witnesses, nor allege that there were no other witnesses duly sworn on whose evidence the indictment was

found, nor allege that the witnesses on whose evidence it was found, were not affirmed, the plea was held bad. — *Id. ibid.*

12. And for the same reasons, a plea in abatement on the ground that the swearing of the witnesses had not been duly certified by the signature of the foreman or other member of the grand jury, under the 1 & 2 Vict. c. 37, was held bad. — *Id. ibid.*
13. An Act of Parliament authorized a railway company to take lands necessary for the railway works, on payment or tender of such sums of money as should have been agreed upon, or awarded by a jury in the manner directed by the Act ; and by the section of the Act for settling differences between the company and owners and occupiers of, or persons interested in, the lands to be taken, it was enacted that if any such person should not agree with the company as to the amount of purchase-money, or should refuse to accept * such purchase-money as should be * 778 offered by the company, or should, for twenty-one days after notice to him in writing, neglect or refuse to treat, or should not agree with the company for the sale of his interest, &c., the company might issue a warrant to the sheriff to summon a jury to assess the sum to be paid for the purchase of the lands ; and the sheriff should give judgment for such sum.

The company issued a warrant, purporting to be pursuant to the powers given by the Act, and requiring the sheriff to summon a jury to assess the value of the plaintiff's lands, &c. The jury was summoned, and assessed the value ; the owner of the land attending, and protesting that the company had no right to take his lands, as not being described in the schedule to the Act. An inquisition was recorded purporting to be taken "pursuant to the Act, on the oaths of jurors duly impanelled, in pursuance of the warrant of inquisition annexed, who assessed the sum to be paid for the property particularized in the warrant, and authorized by the Act to be taken for the railway ; whereupon the sheriff, in pursuance of the Act, gave judgment for that sum." Neither the warrant nor inquisition stated that the owner had refused to treat, or had not agreed with the company for the sale of his land, nor that the company had served on him the notice required by the Act to be given ; but it appeared *aliunde* that he did not agree with the company, and that he had received the requisite notices.

Held, that sufficient facts were stated in the inquisition and warrant to show the jurisdiction of the sheriff and jury. — *Taylor v. Clemson*, 610.

"PORT."

A Railway Act enabled the proprietors of the railway to levy a toll upon "all coals shipped on board any vessel, &c., in the port of Stockton-upon-Tees aforesaid."

Held, that these words meant the whole port of that name, and were not restricted to the port of the town of Stockton-upon-Tees ; that

there was not such an ambiguity in the enacting part of the Act as to compel a reference to the preamble of it ; and that the word " aforesaid " did not limit the expression to the port of the town as described in that preamble.— *Stockton and Darlington Railway Company v. Barrett*, 590.

* 779 * PRACTICE.

1. A declaration consisted of two counts. The defendants pleaded six pleas; four to the first, and two to the second count. The plaintiff demurred specially to the third and fourth pleas, and generally to the sixth plea, and took issue on the others. The Court of Common Pleas gave judgment for the plaintiff on all the demurrers. The cause went to trial on the issues, and a verdict was found for the plaintiff on the issues raised on the first count: as to the issue on the second count, the jurors were discharged by consent. Judgment was afterwards entered for the plaintiff. On a writ of error, the Exchequer Chamber affirmed the judgment of the Common Pleas, except as to the demurrer to the sixth plea, which plea the Exchequer Chamber declared to be a sufficient answer in law to the second count. A general order was made for the defendants to pay costs to the plaintiff, but no order was made to except, out of these general costs, the costs of the sixth plea and the demurrer. The Exchequer Chamber awarded to the plaintiff costs under the statute for delay in the execution of his judgment by reason of the writ of error.

Held, that the Court of Exchequer Chamber ought not to have awarded the costs under the statute, and ought to have excepted the costs of the sixth plea out of the general costs awarded to the plaintiff. — *Bourne v. Galliff*, 45.

2. This House pronounced the same judgment which the Court of Exchequer Chamber ought to have pronounced. — *Id. ibid.*
3. In a claim of peerage, where evidence has been produced for the purpose of establishing a certain point, the party who has produced it will not, should the Crown call evidence of a contradictory kind, be allowed to produce additional evidence confirmatory of the first. — *Sussex Peerage Case*, 85.
4. Before the claimant's junior counsel summed up the evidence previously to the opening of the case on the part of the Crown, the counsel for the Crown were required by the committee to declare whether they would or would not call evidence on a question of foreign law, so as to enable the claimant's counsel to determine whether they would then (as they could not afterwards) produce any additional evidence on that question. — *Id. ibid.*

- * 780 * 5. The 56 Geo. 3, c. 87, is repealed by the 1 & 2 Vict., c. 37; and this latter Act applies to the Court of Queen's Bench, as well as to the Courts of Assize and Quarter Sessions, in Ireland. — *O'Connell and Others v. The Queen*, 156.

6. A challenge to the array in the Court of Queen's Bench in Dublin, alleged that the jurors' book had not been completed in conformity with the requisites of the Act 3 & 4 Will. 4, c. 9 ; that the names of fifty-nine persons, duly qualified to serve on juries, had been fraudulently omitted from the general list from which the book was made up, and from the book itself, for the purpose of prejudicing the defendants ; but the challenge did not contain any specific accusation against the sheriff or other returning officer concerned in preparing the list. *Quære*. Whether the causes of challenge to the array, thus alleged, were sufficient ? — Per Lord DENMAN : They were sufficient. — *O'Connell and Others v. The Queen*, 156.
7. The Court of Queen's Bench in Dublin, in Hilary Term, made an order for a trial at bar in that term ; and another order, declaring that, in case the trial should not terminate before the end of the term, the next and every succeeding day until the first day of the following term, or so many days as should be necessary, should be appointed for the continuation of such trial ; and that every day so appointed should be deemed a part of Hilary Term.
Held, that this order was properly made under the authority of the 1 & 2 Will. 4, c. 31, § 3 ; and had the effect of duly continuing the trial during the days appointed. — *Id. ibid*.
- * 8. After that order, which was entered on the record, a continuance was also entered from the day in vacation on which the verdict was found, until the following term.
Held, that there was no discontinuance. — *Id. ibid*.
9. In a proceeding under a Railway Act, where the Act required a notice to be given, the objection arising on account of the want of such notice, was held to be waived by the party to whom it ought to have been given appearing, and not protesting against the proceedings on that account. — *Taylor v. Clemson*, 610.
10. Several defendants, charged in one indictment with different illegal acts, severed in their defence ; and being convicted and sentenced to different punishments, brought separate writs of error.
* *Held*, that they were entitled to appear by several counsel, * 781 and that such counsel were severally entitled to reply.
11. The counsel for the Crown, where the Crown is the defendant in a writ of error, are not necessarily entitled to the final reply, though the Crown is the real litigant party. — *O'Connell v. The Queen*, 156.
12. The right of a defendant to a peremptory challenge of jurors to the number of twenty, exists in all cases of felony, and is not confined to those which are punishable capitally. The law is, in this respect, the same in Ireland as in England. — *Gray v. The Queen*, 427.
- [13. The existence of a *modus* as to ancient pasture-lands having been

established in a tithe suit, but the application of it to pasture-lands which, after being meadowed or ploughed up within the time of legal memory, had been reconverted to pasture, being disputed, the rector was allowed to take an issue to try that question ; and the House reserved costs and further directions till such issue should have been determined. — *Byron v. Cooper*, 558.

14. *Quære*, whether an appeal will lie against a decree for mere matter of form.

Semble, that on an appeal for such a cause, the House might affirm the decree in all other respects, but vary it on the point of form, and make the appellant pay the costs. — *Waters v. Groom*, 684.

15. A *scire facias* on a judgment is not a mere continuation of a former suit, but creates a new right. — *Farrell v. Gleeson*, 702.

16. A judgment was obtained in 1813. It was revived by *scire facias* in 1828. A bill was filed in 1838 in the Court of Exchequer in Ireland against the representatives of the debtor, praying for an account, and that the principal and interest due on the judgment might be satisfied out of the debtor's personal or real estate. Plea of the Statute of Limitations (3 & 4 Will. 4, c. 27, § 40.)

Held, that the *scire facias* created new rights, and the plea was no bar to the suit. — *Id. ibid.*

17. A case was pending in this House ; the defendant in a similar case made an offer to the plaintiff to be bound by the decision of the House in the case pending. The plaintiff took no notice of the offer, but compelled the defendant to go on with his defence.

- * 782 Judgment was given against the defendant ; * he brought an appeal to this House, and prosecuted it to a hearing after an adverse decision in the case previously pending. Judgment being given against him in his own case, he was ordered to pay the respondent's costs. — *Id. ibid.*

18. A party in equity who mistakes his rights, and sues in a wrong form, is not entitled to an order that would deprive the defendants of the benefit of any alterations made in the law in the mean time. — *Marquis of Waterford v. Knight*, 653.

19. A petition for a bill of review was presented, on the ground of a discovery made (soon after the decree in the cause) that some copies of papers therein put in evidence were not in conformity with the originals.

Held, that as these papers could not of themselves have led to a different result, the petition for leave to file a bill of review had been rightly dismissed. — *Charter v. Trevelyan*, 714.

PRECATORY WORDS. See WILL.

PRINCIPAL AND AGENT. See SOLICITOR AND CLIENT. TRUSTEE.
PRIORITY.

A testator gave his wife his freehold estate of B., and certain specific chattels ; and also an annuity for her life, charged upon all his real estates (except B.), with power of distress for the same ;

the first payment thereof to be made on the 1st of May or November which should first happen after his decease. He then charged his debts upon his real estates (except B.), in aid of his personal estate ; and gave an annuity to his sister, in similar terms to those used respecting that given to his wife. He next gave several pecuniary legacies to nieces and others, to be paid by his trustees, as soon as convenient after his decease, out of the residue of his personal estate, and in deficiency thereof, to be raised and paid by them, as they should think proper, out of his real estates (except B.) ; and he charged the same therewith. He lastly gave two annuities to his servants, in similar terms to those used respecting the preceding annuities. The personal estate was insufficient to pay the debts and legacies. The real estate was insufficient to pay the annuities and legacies. *Held*, upon the true construction of the provisions of the will, that, as to the real estate, the annuities were entitled to priority over the legacies. — *Creed v. Creed*, 491.

* QUARTER SESSIONS. See PRACTICE, 5.

* 783

QUEEN'S BENCH. See PRACTICE, 5.

RAILWAY COMPANY. See TOLL.

An Act of Parliament authorized a railway company to take land necessary for the railway works, on payment or tender of such sums of money as should have been agreed upon, or awarded by a jury in the manner directed by the Act ; and by the section of the Act for settling differences between the company and owners and occupiers of, or persons interested in, lands to be taken, it was enacted that if any such person should not agree with the company as to the amount of purchase-money, or should refuse to accept such purchase-money as should be offered by the company, or should, for twenty-one days after notice to him in writing, neglect or refuse to treat, or should not agree with the company for the sale of his interest, &c., or should not disclose his title if required, or in any other case where agreement for the purchase could not be made, the company might issue a warrant to the sheriff to summon a jury to assess the sum to be paid for the purchase of the lands ; and the sheriff should give judgment for such sum.

The company issued a warrant, purporting to be pursuant to the powers given by the Act, and requiring the sheriff to summon a jury to assess the value of the plaintiff's land, &c. The jury was summoned, and assessed the value ; the owner of the land attending, and protesting that the company had no right to take his lands, as not being described in the schedule to the Act. An inquisition was recorded, purporting to be taken " pursuant to the Act, on the oaths of jurors duly impanelled, in pursuance

of the warrant to the inquisition annexed, who assessed the sum to be paid for the property particularized in the warrant, and authorized by the Act to be taken for the railway ; whereupon the sheriff, in pursuance of the Act, gave judgment for that sum." Neither the warrant nor inquisition stated that the owner had refused to treat, or had not agreed with the company for the sale of his land, nor that the company had served on him the notice required by the Act to be given : but it appeared *aliunde* that he did not agree with the company, and that he had received the requisite notices, in which, and in the warrant, the property was particularized. *Held* —

1st. That sufficient facts were stated in the inquisition and warrant to show the jurisdiction of the sheriff and jury.

* 784 * 2d. That the impanelling a jury, and an assessment by them, being facts inconsistent with an agreement, necessarily imply non-agreement ; and no inquisition is defective for not stating a fact which is necessarily implied by those that are stated.

3d. That notice was waived by the party's appearing, and not protesting for want of notice. — *Taylor v. Clemson*, 610.

RECOGNIZANCES.

Quære. Whether a judgment which directs that each of several defendants shall enter into recognizances to keep the peace, &c., "for the space of seven years next ensuing the acknowledgment thereof," is good, as no period is fixed for entering into the recognizances. — *O'Connell v. The Queen*, 156.

REPLY. See PRACTICE, 10, 11.

ROYAL MARRIAGE ACT.

The Royal Marriage Act, 12 Geo. 3, c. 11, extends to prohibit the contracts of marriages, or to annul any already contracted, in violation of its provisions, wherever the same may be contracted or solemnized, either within the realm of England or without. — *Sussex Peerage Case*, 85.

SCIRE FACIAS.

A *scire facias* on a judgment is not a mere continuation of a former suit, but creates a new right.

A judgment was obtained in 1813. It was revived by *scire facias* in 1828. A bill was filed in 1838, in the Court of Exchequer in Ireland, against the representatives of the debtor, praying for an account, and that the principal and interest due on the judgment might be satisfied out of the debtor's personal or real estate. Plea of the Statute of Limitations (3 & 4 Will. 4, c. 27, § 40).

Held, that the *scire facias* created new rights, and that the plea was no bar to the suit. — *Farrell v. Gleeson*, 702.

* SOLICITOR AND CLIENT.

W., being indebted to C., agreed by deed to convey his estate to C..

upon trust to sell the same, and to pay off certain specified debts of W. due to other persons, and then the debt due from W. to C., and to pay over the surplus, if any, to W. No conveyance was executed. C. being in possession of the estate under a *fi. fa.* issued on a judgment upon a warrant * of * 785 attorney given by W., agreed with W.'s agent to purchase the estate. W. afterwards ratified the contract, but subsequently impeached it, as one made by a trustee for his own benefit and against the interest of the *cestui que trust*.

Held, that C. was not a trustee for W., but was a creditor holding a security for his debt ; and that the contract of sale was valid. — *Waters v. Groom*, 684.

A. was the solicitor and land agent of B., who was desirous of selling an estate, and who in a letter to A. expressed his readiness to sell it for 13,000 guineas. The estate consisted of two portions, and a land-valuer (whose valuation was not shown to have been communicated by A. to B.) put upon the two portions separate values which, added together, exceeded the 13,000 guineas. A. sold part of the estate to C. for a sum exceeding the valuer's estimate of that portion, and then purchased the other portion for a sum much less than that stated in the estimate, but which, added to C.'s purchase-money, just made up 13,000 guineas. A. pretended that the latter purchase was made by one of his relatives, and the conveyance from B. was executed to that relative, but immediately afterwards a conveyance was executed from the relative to A., and in that conveyance was a recital that the purchase-money was furnished by A. These facts were not discovered till thirty-seven years afterwards, and then B. filed his bill against the representatives of A. (who had died seventeen years before) to set aside the latter conveyances, and to have an account.

Held, that the circumstances of the transaction were of a fraudulent nature, and therefore furnished an answer to the objection arising upon the length of time during which the transaction had remained unimpeached. — *Charter v. Trevelyan*, 714.

Held, also, that the bill was sustainable, though disputes which had arisen between A. and B., as to their mutual accounts, had been referred in A.'s lifetime to a barrister, who was empowered to inquire into all matters of difference between them, and who, after awarding the payment of a certain sum by A. to B., had directed the execution of mutual releases of all matters in difference ; and such releases had been executed. — *Id. ibid.*

* SPECIFIC PERFORMANCE. See SOLICITOR AND CLIENT. * 786
STATUTE, CONSTRUCTION OF. See OFFICE. RAILWAY.

1. By the Judges. — The rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are of themselves precise and unambiguous, then no

- more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do, in such case, best declare the intention of the legislature. — *Sussex Peerage Case*, 85.
2. The 56 Geo. 3, c. 87, is repealed by the 1 & 2 Vict. c. 87; and this latter Act applies to the Court of Queen's Bench, as well as to the Courts of Assize and Quarter Sessions, in Ireland. — *O'Connell v. The Queen*, 156.
 3. Clauses in Acts empowering companies to levy a charge upon the public—as in Railway Acts, for example—must, where the meaning is doubtful, be construed favourably for the public. — *Stockton and Darlington Railway v. Barrett*, 590.
 4. The words “existing interests,” in the 57 Geo. 3, c. 64, which was passed to regulate certain public offices in Scotland, do not mean the right of the holder of one office to appoint to another.—*Earl of Rosslyn v. Aytoun*, 742.

TITHES. See MODUS.

A bill for an account of tithes was filed against five defendants, before the expiration of one year from the date of the 2 & 3 Will. 4, c. 100. This bill, after the expiration of that time, was amended under the order of the Court, and four other persons were allowed to be introduced as defendants.

Held, that the suit, as against those latter defendants, must be taken to have commenced at the date at which they were actually introduced into the bill; that they could not, by relation backwards, be treated as defendants in the original bill; and that they were consequently entitled to the protection of the provisions of the statute.

A decree against all the defendants for an account, made in the Court below, was therefore reversed in this House; and the bill, as to the four defendants, ordered to be dismissed, with costs here and in the Court below. — *Byron v. Cooper*, 556.

- * 787 To a bill filed by the rector of F. for an account and payment of tithes, the defence was that the lands occupied by the defendants comprised the manor of F., which was within the rectory of F., and that from time immemorial the owner for the time being of the manor had paid to the rector the yearly sum of 40*l.* for maintenance of Divine service there, for and in lieu of all manner of tithes arising within the manor: and that the owner for the time being of the said manor, or his assigns, had from time immemorial, in respect of the said yearly sum, used to have, and ought to have, the tenth of all tithable things arising within the said manor.

The evidence in the cause showed payments to the rector of 40*l.* yearly for upwards of 150 years, and pernancy of the tithes by the owner of the manor for upwards of 180 years, previously to the

filing of the bill ; and also that in the year 1686, a bill by the then rector of F. for the tithes of the manor, was dismissed upon the same defence.

Held by the Lords (reversing a decree for the account) —

- 1st. That as the account for tithes is merely incident to the rector's legal title, a Court of Equity could not interpose in his favour until he established his right at law.
- 2d. That where a defence to a suit in equity for tithes raises a doubt as to the rector's legal title to them, the course of a Court of Equity is to retain the bill for a specified time, and leave the rector at liberty to establish his title by an action at law within that time. — *Marquis of Waterford v. Knight*, 653.
- 3d. That a party who mistakes his right, and sues in a wrong form, is not entitled to an order that would deprive the defendants of the benefit of any alterations made in the law in the mean time. — *Id. ibid.*

TOLL.

A Railway Act empowered the proprietors to levy on all coals carried along any part of their line, such sum as they should direct, "not exceeding the sum of 4*d.* per ton per mile." It then went on thus : "And for all coal which shall be shipped on board any vessel, &c., in the port of Stockton-upon-Tees aforesaid, for the purpose of exportation, such *sum as the said *788 proprietors shall appoint, not exceeding the sum of one halfpenny per ton per mile."

Held, that with respect to coals shipped for exportation, this was not a cumulative but a substituted toll. — *Stockton and Darlington Railway Company v. Barrett*, 590.

Another Act, passed on the same subject, after reciting the former Act, and also reciting that the proprietors had been at great expense in forming inclined planes on the line of railway, authorized them to demand, "for all articles, &c., for which a tonnage is herein before directed to be paid, which shall pass any inclined plane upon the said railway, such sum as the said proprietors shall appoint, not exceeding the sum of 1*s.* per ton."

Held, that this was a cumulative charge. — *Id. ibid.*

Clauses in Acts empowering companies to levy a charge upon the public — as in Railway Acts, for example — must, where the meaning is doubtful, be construed favourably for the public. — *Id. ibid.*

TORT. See PLEADING.

TRUST. See SOLICITOR AND CLIENT. WILL, 2.

W. being indebted to C., agreed by deed to convey his estate to C., upon trust to sell the same, and to pay off certain debts of W. due to other persons, and then the debt due from W. to C., and to pay over the surplus, if any, to W. No conveyance was executed. C. being afterwards in possession of the estate under a *fi. fa.* issued on a judgment upon a warrant of attorney given by W.,

agreed with W.'s agent to purchase the estate. W. afterwards ratified the contract, but subsequently impeached it as one made by a trustee for his own benefit and against the interest of the *cestui que trust*.

Held, that C. was not a trustee for W., but was a creditor holding a security for his debt ; and that the contract of sale was valid. — *Waters v. Groom*, 684.

WILL.

1. A testator gave his wife his freehold estate of B., and certain specific chattels ; and also an annuity for her life, charged upon
 * 789 all his real estates (except B.), with power of distress * for the first payment thereof to be made on the 1st of May or November, which should first happen after his decease. He next charged his debts upon his real estates (except B.), in aid of his personal estate ; and gave an annuity to his sister, in similar terms to those used respecting that given to his wife. He then gave several pecuniary legacies to nieces and others, to be paid by his trustees, as soon as convenient after his decease, out of the residue of his personal estate ; and in case of deficiency thereof, to be raised and paid by them, as they should think proper, out of his real estates (except B.) ; and he charged the same therewith. He lastly gave two annuities to his servants, in similar terms to those used respecting the preceding annuities.

The personal estate was exhausted in payment of the debts, and the real estate was insufficient for the annuities and legacies.

Held, upon the true construction of the provisions of the will, that the annuities were entitled to priority over the legacies. — *Creed v. Creed*, 491.

2. R. P. K. being entitled, under a settlement and will of his grandfather, to real estates in tail male, with remainders to his cousins in tail, with remainder to himself in fee as right heir of the settlor, suffered a recovery, and acquired the fee-simple. He had other estates in fee-simple by purchase, and considerable personal estate. He by his will gave all his estates, real and personal, to his brother, T. A. K., if living at his own decease, and if not, to T. A. K.'s son, T. A. K. the younger ; and in case he should die before the testator, to his eldest son or next descendant in the direct male line ; and in case he should leave no such descendant, to the next male issue of his said brother and his next descendant in the direct male line ; but in case no such issue or descendant of his said brother or nephew should be living at the time of the testator's decease, to the next descendant in the direct male line of his said grandfather, according to the purport of his will, under which the testator inherited those estates, subject in every case to certain reservations out of the rents ; and he appointed the person who should inherit his said estates under his will his sole executor " and trustee, to carry

the same and every thing contained therein duly into execution, confiding in the approved honour and integrity of his * family to take no advantage of any technical inaccu- * 790 racies, but to admit all the comparatively small reservations which he made out of so large a property, according to the plain and obvious meaning of his words." He then, after giving some legacies, bequeathed his gems and other articles to the British Museum, "on condition that the next descendant in the direct male line then living of his said grandfather should be made an hereditary trustee, to be continued in perpetual succession to his next descendants in the direct male line." And he concluded thus: "I trust to the liberality of my successors to reward any others of my old servants and tenants according to their deserts; and to their justice, in continuing the estates in the male succession, according to the will of the founder of the family, my above-named grandfather."

T. A. K. survived the testator, and died without leaving any son.

Held, that T. A. K. took the estates in fee, absolutely, and that no trust was, or was intended to be, created by the will, a discretion being left to the devisees to defeat the testator's expressed desire.

— *Knight v. Boughton*, 513.

Semble, that the property to which the words of the desire applied, and the nature of the estate to be taken in it, were too uncertain to raise a trust: Per the Lord Chancellor. — *Id. ibid.*

8. T. settled his freehold estates (subject to appointment) on himself in tail, remainder to J. L. and his sons in strict settlement, remainder to L. C. for life; provided that if J. L., or any issue male of his body, should become entitled in possession to his father's family estates, then the uses before declared of T.'s estates for the benefit of him or them who should so become entitled, and for the benefit of his or their issue male, should cease, and those estates should go over as if the person or persons so becoming entitled were dead without issue male.

J. L. having afterwards become entitled in possession to his father's family estates, T., by his will, appointed his said estates to J. H. L. (the eldest son of J. L.) and his sons, in strict settlement, remainder to the heirs of H. H. deceased; provided that if any tenant for life in possession under the will should become entitled in possession to J. L.'s family estates, his interest in the devised estates should cease, and * those estates go * 791 over to the person next in remainder under the will, as if the tenant for life were dead. The testator devised his copyhold estates upon such trusts as would nearest correspond with the uses and trusts of his freehold estates, and then gave all the residue of his real and personal estates to S. M. and W., their and each of their heirs, executors, &c., absolutely, in equal third parts, &c.

On the testator's death in 1824, J. H. L. entered upon his estates under the will; and in 1833 he became entitled in possession

to J. L.'s family estates ; and had no son. A bill was filed by the residuary legatees, claiming the rents of all the estates accruing between 1838 and J. L.'s death or his having a son, against H. H.'s heir, who claimed the same rents, and against L. C. and H. L. (the second son of J. L.), who claimed, adversely to each other, the rents of the freehold estates under the limitations in the settlement, in default of the appointment of them by T.

Held by the Lords (partly affirming a decree made on that bill), first, that the plaintiffs were entitled to the rents of the copyhold estates under the residuary devise ; second (partly reversing the decree), that no adjudication could be made in the cause as to the rents of the freeholds, the question as to them being between codefendants. — *Sanford v. Morrice*, 667.

WITNESS.

A Roman Catholic bishop holding the office of coadjutor to a vicar-apostolic in this country, is, in virtue of that office, to be considered as a person skilled in the matrimonial law of Rome, and therefore admissible as a witness to prove that law. — *Sussex Peerage Case*, 85.

The declarations of a deceased clergyman to his son, to the effect that he had celebrated a marriage between a deceased peer and his alleged wife, are not receivable in evidence, upon a claim of peerage, as the declarations of a deceased party made against his own interest ; such interest not being of a pecuniary nature. — *Id. ibid.*

The law does not recognize the apprehension of possible danger of a prosecution as creating an interest which can bring these declarations within the rule in favour of their admissibility in evidence upon the ground of their being declarations * made against the interest of the party making them. — *Id. ibid.*

The 56 Geo. 3, c. 87, is repealed by the 1 & 2 Vict. c. 37 ; and this latter Act applies to the Court of Queen's Bench, as well as to the Courts of Assize and Quarter Sessions, in Ireland. — *O'Connell and Others v. The Queen*, 156.

WORDS, MEANING OF PARTICULAR. See "EXPORTATION."

"INTIMIDATION." "PORT." STATUTE.

[668]

END OF THE ELEVENTH VOLUME.

